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CLEANSING THE AUGEAN STABLES: A CRITICAL ANALYSIS OF RECENT TRENDS IN THE PLEA BARGAINING DEBATE IN CANADA

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We have previously recognized plea bargaining as an ineradicable fact. Failure to recognize it tends not to destroy it but to drive it underground. We reiterate what we have said before: that when plea bargaining occurs it ought to be spread on the record . . . and publicly disclosed.¹

[P]lea-bargaining, is something for which a decent criminal justice system has no place. There has to be a trial.²

I. INTRODUCTION

In recent years there has been a veritable flood of literature on the subject of plea bargaining in Canada. A similar enthusiasm for the topic is discernible in the literature of other common law jurisdictions such as the

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¹ Notes of Advisory Committee on Rules, Fed. Rules Cr. Proc. Rule 11, 18 U.S.C.A. at 24.

² Law Reform Commission of Canada, *Fourth Annual Report* (Ottawa: Information Canada, 1974-75) at 14.

United States and England.³ Responses to these publications, which have brought plea bargaining to the forefront of debate over the future of the criminal justice system, have been sharply divergent. For example, the United States Supreme Court⁴ and Congress⁵ recently have bestowed the mantles of respectability and legitimacy upon the practice of prosecutorial plea bargaining, while the National Advisory Commission on Criminal Justice Standards and Goals has condemned the practice in unequivocal terms.⁶ Similarly, in Canada, while the Canadian Bar Association *appears* to recognize the propriety of the practice,⁷ both the Canadian⁸ and Ontario Law

³ In addition to the sources cited *infra*, see, in Canada, Parker, *Copping a Plea*, [1972] Chitty's L.J. 310; *Editorial Note* (1970), 12 Crim. L.Q. 245; *Letter to the Editor* (1971), 19 Chitty's L.J. 110; Martin, *The Role and Responsibility of the Defence Advocate* (1970), 12 Crim. L.Q. 376 at 389-90; Klein, *Habitual Offender Legislation and the Bargaining Process* (1973), 15 Crim. L.Q. 417; Ducros, "The Role of the Trial Judge in the Criminal Process," in Canadian Bar Association, *Studies in Criminal Law and Procedure* (Ottawa: C.B.A., 1973) 1 at 4-5; Hoolihan, "Ethical Standards for Defence Counsel," in *id.* at 124; *Editorial* (1976), 25 Chitty's L.J. 78; Grosman, *Letter to The Globe and Mail*, April 12, 1976 at 7; and Tepperman, *Crime Control: The Urge Toward Authority* (Toronto: McGraw-Hill Ryerson, 1977) at 79-84; in the United States, Alschuler, *The Defense Attorney's Role in Plea Bargaining* (1975), 84 Yale L.J. 1179; Bond, *Plea Bargaining and Guilty Pleas* (New York: Clark Boardman Co., 1975); Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice* (1956), 46 J. Crim. L., Criminology & Pol. Sci. 78; Note, *Guilty Plea Bargains: Compromises by Prosecutors to Secure Guilty Pleas* (1964), 112 U. Pa. L. Rev. 865; Skolnick, *Social Control in the Adversary System* (1967), 11 J. of Conflict Res. 52; White, *A Proposal for Reform of the Plea Bargaining Process* (1971), 119 U. Pa. L. Rev. 439; Goldstein, *For Harold Lasswell; Some Reflections on Human Dignity, Entrapment, Informed Consent and the Plea Bargain* (1975), 84 Yale L.J. 683; and Rosett and Cressey, *Justice by Consent: Plea Bargains in the American Courthouse* (Philadelphia: Lippincott, 1976); and in England, Thomas, *An Exploration of Plea Bargaining*, [1969] Crim. L. Rev. 59; White, Newark and Samuels, *Offences Taken Into Consideration*, [1970] Crim. L. Rev. 311; Thomas, *Plea Bargaining and the Turner Case*, [1970] Crim. L. Rev. 559; Davis, *Sentences for Sale: A New Look at Plea Bargaining in England and America*, [1971] Crim. L. Rev. 150 at 218; Adams, *The Second Ethical Problem in R. v. Turner: The Limits of an Advocate's Discretion*, [1971] Crim. L. Rev. 252; Purves, *That Plea Bargaining Business: Some Conclusions From Research*, [1971] Crim. L. Rev. 470; Samuels, *The Guilty Plea and Sentencing: Proposed Improvements*, [1971] Sol. J. 120; Thomas, *The Judicial Approach to Plea Bargaining* (1972), 5 Man. L.J. 201; Cooper, *Plea Bargaining: A Comparative Analysis* (1972), 5 N.Y.U.J. Int'l L. & Pol. 427 at 434 ff.; Bottomley, *Decisions in the Penal Process* (London: Martin Robertson, 1973) at 105 ff.; Bottoms and McClean, *Defendants in the Criminal Process* (London: Routledge & Kegan Paul, 1976); Heberling, *Conviction without Trial* (1973), 2 Anglo-American L. Rev. 428; and Seifman, *The Plea Bargaining Process: Trial by Error?* (1977), 127 New L.J. 551.

⁴ *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495 (1971).

⁵ See Rule 11 of the Federal Rules of Criminal Procedure. Also see the submissions of the Supreme Court to the Congress in relation to the amended Rule 11 as discussed in Brand, *Revised Federal Rule 11: Tighter Guidelines for Pleas in Criminal Cases* (1976), 44 Fordham L. Rev. 1010.

⁶ National Advisory Commission on Criminal Justice Standards and Goals, *Courts* (Washington: U.S. Government Printing Office, 1973) at 42-65. See Standard 3.1.

⁷ Canadian Bar Association, *Code of Professional Conduct* (Ottawa: C.B.A., 1974), chap. VIII, "The Lawyer as Advocate," Commentary No. 10, at 30-31.

⁸ Law Reform Commission of Canada, *supra* note 2, at 14. Also see *Criminal Procedure: Control of the Process*, Working Paper No. 15 (Ottawa: Information Canada, 1975) at 44-47.

Reform Commissions⁹ have contended that plea bargaining is highly improper and that it should be abolished. Quite clearly, strong positions have been taken as to the propriety of plea bargaining, even though our knowledge about the phenomenon is extremely limited. Unfortunately, very little of the voluminous literature contributes to a clarification of the critical issues raised by the practice of plea bargaining. It is submitted that the quality of the debate on plea bargaining would be enhanced immeasurably were more attention paid to the fruits of empirical research. While empirical investigations cannot furnish ready-made solutions to the problems raised by plea bargaining, they can at least provide a basis upon which major policy decisions could be reached with some advertence to the practical effects of implementing such decisions.

In 1974, the Canadian Bar Review published a very influential article by Gerald Ferguson and Darryl Roberts,¹⁰ whose analysis of the issues raised by plea bargaining effectively prompted the Law Reform Commission of Canada to adopt an "abolitionist" stance. Although the article was clearly one of the most thorough and comprehensive reviews of the relevant issues, the authors were unable to relate their analysis to any significant body of empirical research dealing with plea bargaining as it is practised in Canada.¹¹ Furthermore, they did not conceive of their task as including a systematic review of the extensive research literature published in the United States. Since the Ferguson and Roberts article appeared, the findings of at least four significant studies of plea bargaining in Canada have been published.¹² In addition, the American literature has been enriched considerably in recent years by the publication of some critical studies dealing with issues that are at the very core of the controversy surrounding plea bargaining.¹³

⁹ Law Reform Commission of Ontario, *Report on Administration of Ontario Courts, Part II* (Toronto: Ministry of the Attorney General, 1973) at 119-25.

¹⁰ Ferguson and Roberts, *Plea Bargaining: Directions for Canadian Reform* (1974), 52 Can. B. Rev. 498.

¹¹ Ferguson and Roberts were aware of both the importance and lack of empirical research. See text accompanying note 110, *infra*.

¹² See Klein, *Let's Make a Deal: Negotiating Justice* (Toronto: D.C. Heath, 1976); Hartnagel, *Plea Negotiations in Canada* (1975), 17 Can. J. Crim. & Corr. 45; Wynne and Hartnagel, *Race and Plea Negotiations: An Analysis of Some Canadian Data* (1975), 1 Can. J. Soc. 147; and Hagan, *Parameters of Criminal Prosecution: An Application of Path Analysis to a Problem of Criminal Justice* (1975), 65 J. Crim. L. & Criminology 536.

¹³ See, for example, Georgetown University Law Center, *Plea Bargaining in the United States, Phase I Report* (Washington: n. pub., 1977); Gillespie, *Judicial Productivity and Court Delay: An Exploratory Analysis of the Federal District Courts* (Washington: U.S. Dept. of Justice, 1977); Nimmer and Krauthaus, *Plea Bargaining: Reform in Two Cities* (1977), 3 Justice System J. 6; Eisenstein and Jacob, *Felony Justice: An Organizational Analysis of Criminal Courts* (Boston: Little, Brown, 1977); Mather, *Some Determinants of the Method of Case Disposition: Decision-Making by Public Defenders in Los Angeles* (1973), 8 Law & Society Rev. 187; Note, *The Elimination of Plea Bargaining in Black Hawk County: A Case Study* (1975), 60 Iowa L. Rev. 1053; Heumann, *A Note on Plea Bargaining and Case Pressure* (1975), 9 Law & Society Rev. 515; Church, *Plea Bargains, Concessions and the Courts: Analysis of a Quasi-Experiment* (1976), 10 Law & Society Rev. 377; Berger, *The Case Against Plea Bargaining* (1976), 62 A.B.A.J. 621; Heumann, *Plea Bargaining: The Experiences of Prosecutors, Judges and Defense Attorneys* (Chicago: University of Chicago Press, 1978); Utz, *Settling the Facts: Discretion and Negotiation in Criminal Court* (Toronto: Lexington Books, 1978); and

The purposes of this article are, first, to undertake a systematic review of the legal approaches to plea bargaining in Canada and the United States, with particular reference to recent developments of great significance; second, to examine the recent proposals for the reform of plea bargaining within the two jurisdictions; third, to investigate the extent and nature of plea bargaining in Canada; and fourth, to evaluate the proposal of the Law Reform Commission of Canada to abolish plea bargaining in the light of empirical research undertaken in both Canada and the United States.

II. PLEA BARGAINING IN THE UNITED STATES: THE JUDICIAL AND LEGISLATIVE RESPONSE

The last century has witnessed a series of dramatic changes in the approach of the American courts to prosecutorial plea bargaining. In the latter half of the 19th century, it appears that the courts treated plea bargaining as an "essentially immoral" practice, and attempted to suppress it.¹⁴ By the early 1920's, significant changes in the courts' approach had taken place. While the legal profession as a whole continued to condemn the practice as being contrary to principle,¹⁵ there is nevertheless sufficient contemporary evidence to suggest that plea bargaining in fact occurred to a significant extent.¹⁶ In order to reconcile the overriding principle that justice should not be the subject of bargaining with the realities of everyday practice, the response of the courts was to permit plea bargaining to flourish while studiously ignoring its existence at an official level.¹⁷ Writing in 1932, Thurman Arnold pointed to the stark contrast between the principle that

Buckle and Buckle, *Bargaining for Justice: Case Disposition and Reform in the Criminal Courts* (New York: Praeger, 1977).

¹⁴ See *Golden v. State*, 49 Ind. 424 at 427 (Cir. Ct. 1875); and *Wight v. Rindskopf*, 43 Wis. 344 at 355 (S. Ct. 1877). In the former case, the Court compared plea bargaining to "corruptly purchasing an indulgence," while, in the latter, an attorney's promise to negotiate a plea with the prosecutor was denounced as "essentially immoral," and against public policy. These cases are cited in Note, *The Legitimation of Plea Bargaining: Remedies for Broken Promises* (1973), 11 Am. Crim. L. Rev. 771 at 771, n. 4.

¹⁵ See Pound, *Criminal Justice in America* (New York: H. Holt, 1930) at 184; Moley, *Politics and Criminal Prosecution* (New York: Arno, 1974 reprint of Minton, Balch, 1929); Illinois Association for Criminal Justice, *The Illinois Crime Survey* (Montclair, N.J.: Patterson-Smith, 1929); and Missouri Association for Criminal Justice, *Missouri Crime Survey* (Montclair, N.J.: Patterson-Smith, 1926). Also see Alschuler, *The Prosecutor's Role in Plea Bargaining* (1968), 36 U. Chi. L. Rev. 50 at 51.

¹⁶ See, for example, Arnold, *Law Enforcement—An Attempt at Social Dissection* (1932), 42 Yale L.J. 1 *passim*; Molen, *The Vanishing Jury* (1928), 2 S. Cal. L. Rev. 97 at 97-127; Miller, *The Compromise of Criminal Cases* (1927), 1 S. Cal. L. Rev. 1; and Baker, *The Prosecutor—The Initiation of Prosecution* (1933), 23 J. Crim. L., Criminology & Pol. Sci. 779.

¹⁷ Kadish and Kadish, *Justified Rule Departures by Officials* (1971), 59 Cal. L. Rev. 905 at 944-45. Newman documents the existence of the courtroom charade in which the judge asks the defendant entering a plea of guilty whether anyone had made promises or inducements to influence him to plead guilty. The appropriately coached defendant replied that no such promises or inducements had been made even though all the participants in the ritual (even the judge himself) knew that in fact the opposite was the case. See Newman, *Conviction: The Determinants of Guilt or Innocence Without Trial* (Boston: Little, Brown, 1966) at 7 and 76 ff. Newman indicates that the approach of the courts varied somewhat from jurisdiction to jurisdiction. Also see *U.S. v. Williams*, 407 F. 2d 940 at 947, n. 11 (4th Cir. 1969); and *U.S. v. Jackson*, 390 F. 2d 130 at 138 (7th Cir. 1968), cited in Kadish and Kadish, *op. cit.*, at 945, n. 122.

placed plea bargaining beyond the pale, on the one hand, and the widespread incidence of the practice, on the other.

Probably the difficulty with our compromise system and the technique of obtaining guilty pleas today lies in the necessity of explaining it away and in the fact that concealed practices have a bad odor. In civil cases we find compromises actually encouraged as a more satisfactory method of settling disputes between individuals than an actual trial. However, if the dispute (even though it is actually only a quarrel between individuals) finds itself in the field of criminal law, "Law Enforcement" repudiates the idea of compromise as immoral, or as at best a necessary evil. The "State" can never compromise. It must "enforce the law". Therefore open methods of compromise are impossible.¹⁸

In recent years, the courts have reversed their policy of officially ignoring the practice of plea bargaining and have taken it out of the closet. In 1967, both the President's Commission on Law Enforcement and Administration of Justice¹⁹ and the American Bar Association Project on Standards for Criminal Justice²⁰ advocated that the negotiated plea should be recognized as a legitimate process provided that it be brought under strict regulation. Shortly thereafter, the Chief Justice of the Supreme Court of the United States, in delivering the opinion of the Court in the case of *Santobello v. New York*, contended that:

The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged.

. . . .

It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.²¹

¹⁸ Arnold, *supra* note 16, at 19.

¹⁹ President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* (Washington: U.S. Government Printing Office, 1967) at 9-13.

²⁰ A.B.A. Project on Minimum Standards for Criminal Justice, *Standards Relating to Pleas of Guilty* (tent. draft, 1969) at 45. The draft was approved with minor revisions in February, 1968. In 1973 the Standards were amended. For further discussion of the A.B.A. Standards, see Rotenberg, *The Progress of Plea Bargains: The A.B.A. Standards and Beyond* (1975), 8 Conn. L. Rev. 44.

²¹ *Supra* note 4, at 260-61 (U.S.), 498 (S. Ct.). It should be noted that the Chief Justice disapproved of the use of the term "plea bargaining." He emphasized instead the notion of "plea agreements," which follow "plea discussions." The intention of the Chief Justice appears to have been to ensure that the parties to any plea agreement should understand fully that they cannot fetter the trial court's freedom of action. This principle is underscored strongly in the recently amended Rule 11 of the Federal Rules of Criminal Procedure. The trend toward recognition and approval of plea bargaining dates back to the case of *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463 (1970). The position of the U.S. Supreme Court is fully discussed in Conlyn, *The Supreme Court's Changed View of the Guilty Plea* (1973-74), 4 Memphis St. U. L. Rev. 79; and Alschuler, *The Supreme Court, The Defense Attorney and the Guilty Plea* (1975), 47 U. Colo. L. Rev. 1. At about the same time, some state supreme courts began to adopt an approach similar to that maintained by the U.S. Supreme Court in *Santobello*. See, for example, *People v. West*, 91 Cal. Rptr. 385, 477 P. 2d 409 (1970). See, generally, Green, Ward and Arcuri, *Plea Bargaining: Fairness and Inadequacy of Representation* (1975-76), 7 Colum. Human Rights L. Rev. 495 at 498-500.

Subsequently, both the American Law Institute²² and the National Conference of Commissioners on Uniform State Law²³ have promulgated standards that recognize the legitimacy of the negotiated plea while submitting it to strict judicial scrutiny. The only major national body to advocate the complete abolition of plea bargaining has been the National Advisory Commission on Criminal Justice Standards and Goals.²⁴ Furthermore, most academic and professional commentators appear to accept the legitimacy of the practice while they still press for adequate safeguards to protect the interests of accused persons.²⁵ At least as far as the federal courts are concerned, these remarkable developments culminated in the recent amendments to Rule 11 of the Federal Rules of Criminal Procedure.²⁶

Rule 11 recognizes that the negotiated plea is a perfectly legitimate procedure within the pre-trial process. The gist of the rule is the requirement that any plea agreement reached between the defence and the prosecution must be disclosed to the trial judge—usually in open court.²⁷ At this stage, the trial court judge may decide to accept or reject the agreement; alternatively, he may decide to defer his decision until he has had occasion to consider a pre-sentence report.²⁸ If a court decides to accept the plea agreement, the judgment and sentence handed down must embody the disposition and sentence contemplated by the agreement. On the other hand, if the trial judge decides to reject the plea agreement, he must inform the parties of this fact and grant the defendant the opportunity to withdraw his plea. Furthermore, the judge must inform the defendant that if he persists in his decision to enter a plea of guilty the ultimate disposition of the case may

²² *A Model Code of Pre-Arrest Procedure* (Philadelphia: A.L.I., 1975) art. 350.

²³ *Uniform Rules of Criminal Procedure: Model Penal Code* (St. Paul, Minn.: West Pub., 1974) rules 441-44.

²⁴ *Supra* note 6. The Commission recommended that plea negotiation should be abolished by no later than 1978. A set of standards was drawn up for the regulation of plea negotiation in the interim (at 42-65). For a critique of the Commission's recommendations, see Cahalan, *Comments on the Court's Task Force Report* (1973), 9 Prosecutor 125.

²⁵ See Newman and NeMoyer, *Issues of Propriety in Negotiated Justice* (1970), 47 Denver L.J. 367; Note, *Official Inducements to Plead Guilty: Suggested Morals for the Market Place* (1964), 32 U. Chi. L. Rev. 167; Enker, "Perspectives on Plea Bargaining," in President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts*, *supra* note 19, at 108-19, Appendix A; Note, *Restructuring the Plea Bargain* (1972), 82 Yale L.J. 286; and Wheatley, *Plea Bargaining: A Case for Its Continuance* (1974), 59 Mass. L.Q. 31. Nevertheless, there remain a minority of commentators who urge the abolition of plea bargaining. See, for example, Bazelon, *New Gods for Old: "Efficient" Courts in a Democratic Society* (1971), 46 N.Y.U. L. Rev. 653 at 663 ff; Note, *The Unconstitutionality of Plea Bargaining* (1970), 83 Harv. L. Rev. 1387; Kipnis, *Criminal Justice and the Negotiated Plea* (1976), 86 Ethics 93; and Dean, *The Illegitimacy of Plea Bargaining* (1974), 38 Fed. Prob. 18.

²⁶ *Supra* note 1. Also see Brand, *supra* note 5. In general, the legislation embodies many of the substantial principles defined by the A.B.A., the A.L.I., and the *Uniform Rules of Criminal Procedure*.

²⁷ Fed. Rules Cr. Proc. Rule 11(e)(2). Contrary to the recommendations of the Chief Justice of the Supreme Court of the United States, Congress added a provision that provides for disclosure of such an agreement to be made *in camera* upon a "showing of good cause."

²⁸ Fed. Rules Cr. Proc. Rule 11(e)(2), (3), (4).

turn out to be less favourable to the defendant than the sentence and disposition contemplated by the plea agreement. A critical element in the amendment to Rule 11 is the provision that limits the courses of action open to the prosecution in the negotiations leading to a plea agreement. As a result of the amendments, the government attorney may offer only three types of concession in exchange for the entry of a guilty plea. He may:

(A) move for dismissal of other charges; or (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or (C) agree that a specific sentence is the appropriate disposition of the case.²⁹

While Rule 11 absolutely forbids the trial judge from participation in any plea discussions,³⁰ it assigns the court an extremely active role once it has been informed that a plea agreement has been reached. The Rule specifies a series of questions that the judge must address to the defendant personally in order to determine if the latter fully understands the implications and consequences of pleading guilty,³¹ if he understands that the plea is entirely voluntary,³² and that there is a factual basis for the plea.³³

²⁹ Fed. Rules Cr. Proc. Rule 11(e)(1).

³⁰ *Id.*

³¹ Fed. Rules Cr. Proc. Rule 11(c):

(c) Advice to Defendant.

Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

³² Fed. Rules Cr. Proc. Rule 11(d). Some of the Supreme Court's criteria for determining the voluntariness of the plea of not guilty are stated clearly in *Brady v. United States*, *supra* note 21. Also see Bond, *Plea Bargaining—A Case Note* (1977), 3 Justice System J. 58. An important question when considering the voluntariness of the plea is the extent to which the courts will investigate the competence of counsel who advised his client to plead guilty. See Note, *Effective Assistance of Counsel in Plea Bargaining: What is the Standard?* (1973), 12 Duquesne L. Rev. 321. Also see Barkai, *Accuracy Inquiries for all Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?* (1977), 126 U. Pa. L. Rev. 88.

³³ Fed. Rules Cr. Proc. Rule 11(f). This provision substantially modified the position of the U.S. Supreme Court in *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970).

The amended Rule 11 represents a significant shift away from the traditional adversarial model in which substantive issues relating to guilt or innocence are determined in the process of a full trial, and in which the judge assumes the role of a relatively impassive arbitrator between defence and government counsel. More specifically, the rule legitimizes the system of everyday practice in which the majority of findings of guilt are reached without the formalities of a full trial and, in a novel development, it forces the trial judge to ensure that the interests of both the state and the defendant are protected adequately during the process of reaching a plea agreement. In effect, American criminal procedure, insofar as it relates to the guilty plea in the federal courts, is assuming an increasingly inquisitorial dimension.³⁴ It is significant that recent commentators have advocated that the judiciary adopt an even more inquisitorial role.³⁵ Indeed, it has been suggested that a magistrate or judge should be involved in pre-trial plea conferences in which issues such as pre-trial discovery could be dealt with in addition to matters relating to plea agreements.³⁶ Such a development would render the role of the American judiciary not unlike that played by their civil law counterparts.

It remains to be seen whether the new Rule 11 will find acceptance in the state courts.³⁷ It is not inconceivable, of course, that the federal courts will hold that the essential principle underlying the Rule must in fact be

³⁴ Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure* (1974), 26 Stan. L. Rev. 1009. It must be noted that the pre-trial process nevertheless retains some of the essential elements of the adversarial system. The trial judge plays no part in the process by which plea agreements are reached. Although he may reject an agreement, he has no freedom to interfere with the provision of an agreement that he has decided to accept. In effect, he may accept an agreement *in toto*, or reject it out of hand; there are no alternatives between these two courses of action.

³⁵ Note, *Plea Bargains and the Transformation of the Criminal Process* (1977), 90 Harv. L. Rev. 564; Note, *Restructuring the Plea Bargain*, *supra* note 25; Alschuler, *The Trial Judge's Role in Plea Bargaining, Part One* (1976), 76 Colum. L. Rev. 1059 esp. at 1122 ff.

³⁶ Note, *The Preliminary Hearing in California: Adaptive Procedures in a Plea Bargaining System of Criminal Justice* (1976), 28 Stan. L. Rev. 1207.

³⁷ Some state legislatures have enacted statutory provisions that closely resemble Rule 11 of the Federal Rules of Criminal Procedure *before* it was amended. Alaska, Hawaii and Washington are examples of this trend. See Bishop, *Guilty Pleas in the Pacific North West* (1973), 51 J. Urban L. 170. In California, the legislature enacted provisions that indicated a growing recognition and approval of plea bargaining, and that to a large extent adopted the requirements of Rule 11 into California criminal practice. These statutory provisions relate only to the entry of guilty pleas to lesser included offences, or to specify the sentence upon which a guilty plea is conditional. However, the California Supreme Court has held that these statutory provisions may also serve as guidelines for plea agreements concerning pleas to lesser offences. See *People v. West*, *supra* note 21. See, generally, Comment, *An Offer You Can't Refuse: The Current State of Plea Bargaining in California* (1976), 7 Pacific L.J. 80; and Comment, *Judicial Supervision of a California Plea Bargain: Regulating the Trade* (1971), 59 Cal. L. Rev. 962. Other states have no legislation that regulates the administration of plea bargaining, and the courts in some of these states do not appear to have applied rules of practice that reflect the provisions of Rule 11. See, for example, Note, *Withdrawal of Pleas in Nebraska: The Rejected Plea Bargain* (1977), 56 Neb. L. Rev. 193.

applied by state courts on the basis that they are required by the federal Bill of Rights.³⁸

In sum, there have been at least four phases in the development of the modern approach to plea bargaining in the United States: a period in which the courts branded the practice as immoral and actively attempted to eradicate it, a period in which plea bargaining appears to have flourished while the courts studiously ignored its existence—on the basis that plea bargaining was considered to be a necessary evil that had to be endured despite its flagrant contradiction of accepted principles, a stage in which the existence of plea bargaining was recognized publicly by commentators and learned commissions, and, finally, a period when the courts recognized the legitimacy of plea bargaining within the criminal justice process and, hand in hand with the legislature, have attempted to subject the practice to strict regulation.

III. PLEA BARGAINING IN CANADA: THE JUDICIAL RESPONSE

It appears that plea bargaining has existed in Canada for a considerable period of time—albeit to a completely unknown extent.³⁹ Nevertheless, there are very few cases in which Canadian courts have expressed a view as to the merits or propriety of prosecutorial plea bargaining. Such studious taciturnity is somewhat enigmatic, given the fact that there are many decided cases in which even the briefest glance at the report indicates that some sort of bargain must have been struck between Crown and defence counsel.⁴⁰ Yet, as Ferguson remarks, “the Courts have not even inquired into the existence of the bargain, let alone whether bargains may properly be made.”⁴¹

Perhaps the dearth of judicial comment as to the propriety of plea bargaining stems in part from the deep-seated reluctance of the courts to interfere with the exercise of prosecutorial discretion—an area traditionally regarded as falling within the exclusive jurisdiction of the federal and provincial attorneys general.⁴² The general approach of the courts is perhaps best

³⁸ In *Boykin v. Alabama*, 395 U.S. 238 at 247, 89 S. Ct. 1709 at 1714 (1969), Harlan J. in dissent argued that his colleagues effectively had made the procedures of Rule 11 (as it then was) “substantially applicable to the States as a matter of federal constitutional due process.” See, generally, Comment, *An Offer You Can't Refuse: The Current State of Plea Bargaining in California*, *id.* at 90-92.

³⁹ See *R. v. Ah Tom* (1928), 60 N.S.R. 1, [1928] 2 D.L.R. 748, 49 C.C.C. 204 (C.A.); and *R. v. Stone* (1932), 4 M.P.R. 455, 58 C.C.C. 262 (N.S.S.C.). Only in the latter case was any comment made as to the propriety of prosecutorial plea bargaining, and even then the comment was extremely mild: “It may be that the bargain could not properly be made; but it was made, and was broken.” (at 462 (M.P.R.), 267 (C.C.C.) *per* Graham J.).

⁴⁰ See, for example, the cases cited in Ferguson, *The Role of the Judge in Plea Bargaining* (1973), 15 *Crim. L. Q.* 26 at 27, n. 8.

⁴¹ *Id.*

⁴² See, generally, Klein, *Plea Bargaining* (1972), 14 *Crim. L.Q.* 289 esp. at 294; and Grosman, *The Role of the Prosecutor in Canada* (1970), 18 *Am. J. Comp. L.* 498. For a sceptical view of the actual extent to which the Attorney General can control the activities of his agents, and to which his responsibility to the legislature is a safeguard for the public interest, see Chasse, *Annotation; Abuse of process as a control of prosecutorial discretion* (1970), 10 *C.R.N.S.* 392. Also see Cohen, *Due Process of Law*;

illustrated by the decision of the Supreme Court of Canada in *Smythe v. The Queen*, where Fauteux C.J.C. said:

Obviously, the manner in which the Attorney General of the day exercises his statutory discretion may be questioned or censured by the legislative body to which he is answerable, but that again is foreign to the determination of the question now under consideration. Enforcement of the law and especially of the criminal law would be impossible unless someone in authority be vested with some measure of discretionary power.⁴³

The courts have hitherto operated on the assumption that the vast discretionary powers exercised by Crown counsel as agents of the Attorney General will be exercised in the best interests of justice because of the prosecutor's role as a "minister of justice" who is above partisan advocacy.⁴⁴ Indeed, the reluctance of the Canadian judiciary to interfere with the exercise of prosecutorial discretion is underscored by the recent decision by a close majority of the Supreme Court of Canada to bury, or at least curtail the growth of, the infant doctrine of abuse of process.⁴⁵

Closely related to the judicial reluctance to invade the domain of prosecutorial discretion is the relatively passive role assigned by Canadian

The Canadian System of Criminal Justice (Toronto: Carswell, 1977) at ch. 3, *passim*. Cohen concludes (at 195) that "... optimism over our future ability to control the prosecutor appears to be an unwarranted luxury. The discretions of the prosecutor, vast in scope as they are, seemingly are immune to effective challenge." However, see Graburn, *The Relationship of the Crown Attorney to the Attorney General* (1976), 35 C.R.N.S. 259.

⁴³ [1971] S.C.R. 680 at 686, 19 D.L.R. (3d) 480 at 484.

⁴⁴ See, generally, *Boucher v. The Queen*, [1955] S.C.R. 16 at 23, 110 C.C.C. 263 at 269 *per* Rand J.; Shapray, *The Prosecutor as a Minister of Justice* (1969), 15 McGill L.J. 125; Turner, *The Role of Crown Counsel in Canadian Prosecutions* (1962), 40 Can. B. Rev. 439; and Bowen-Coulthurst, *Some Observations on the Duties of a Prosecutor* (1969), 11 Crim. L.Q. 377.

⁴⁵ *Rourke v. The Queen*, [1978] 1 S.C.R. 1021, 76 D.L.R. (3d) 193, 35 C.C.C. (2d) 129. In giving the reasons of the Court, Pigeon J. said: "For the reasons I gave in *The Queen v. Osborn*, I cannot admit of any general discretionary power in courts of criminal jurisdiction to stay proceedings regularly instituted because the prosecution is considered oppressive." (at 1043 (S.C.R.), 209 (D.L.R.), 145 (C.C.C.)) However, it does appear that abuse of process is a doctrine that might still be summoned to aid in exceptional circumstances. See *Re Orysiuk and The Queen*, [1977] 6 W.W.R. 410, 37 C.C.C. (2d) 445 (Alta. C.A.). A vast area of case law has been carved out in recent years by the doctrine of abuse of process. The intense judicial activity in this area has been paralleled by a burgeoning field of law journal commentary. See, generally, Angene, *Case References on Abuse of Process* (1977), 37 C.R.N.S. 153; Barton, *Abuse of Process as a Plea in Bar of Trial* (1972), 15 Crim. L.Q. 437; Chasse, *Abuse of Process as a Control of Prosecutorial Discretion* (1970), 10 C.R.N.S. 392; Chasse, *The Crown's Power to Withdraw Charges* (1976), 33 C.R.N.S. 218; Chasse, *The Re-laid Charge and Autrefois Acquit* (1971), 13 C.R.N.S. 196; Ewaschuk, *The Rule Against Multiple Convictions and Abuse of Process* (1974), 28 C.R.N.S. 28; Mewett, *Nemo bis Vexari* (1974), 16 Crim. L.Q. 382; Sheppard, *Rule against Multiple Convictions* (1976), 54 Can. B. Rev. 627; Stenning, *Observations on the Supreme Court of Canada's Decision in R. v. Osborn* (1970), 13 Crim. L.Q. 164; and Sun, *The Discretionary Power to Stay Criminal Proceedings* (1974), 1 Dal. L.J. 482. Also see Cohen, *Abuse of Process: The Aftermath of Rourke* (1977), 39 C.R.N.S. 349; and the recent comments by Olah, *The Doctrine of Abuse of Process: Alive and Well in Canada* (1978), 1 C.R. (3d) 341.

jurisprudence to the trial judge faced with the entry of a guilty plea by the defendant. Unlike his counterpart in the American federal courts, the Canadian trial judge is not bound by law to investigate the circumstances surrounding all guilty pleas before accepting them.⁴⁶ His failure to inquire into such circumstances may result in the reversal of a conviction where the appellate court feels that there is some doubt as to whether the defendant "fully" understood the nature of the charge.⁴⁷ Where the defendant has been represented by defence counsel, however, such a reversal of conviction will occur infrequently.⁴⁸ In other words, the presence of defence counsel generally will excuse the trial judge from conducting a meticulous inquiry into the circumstances surrounding a guilty plea.⁴⁹ In sum, the lack of a requirement under Canadian law that a judge ferret out the critical factors that may have led to the defendant's decision to plead guilty has effectively created an environment in which it is possible for Crown and defence counsel to enter into plea bargains behind the inscrutable veil of secrecy.

A further explanation for judicial silence as to the question of prosecutorial plea bargaining may lie in the fact that the law journal commentators, professional bodies, and law reform commissions only recently have begun to tackle the issue in a frank and critical manner. The event that precipitated open debate about plea bargaining in Canada appears to have been the publication of Brian Grosman's work on the prosecutor.⁵⁰ Conclusions as to the propriety of plea bargaining have been mixed; some commentators have advocated total abolition while others have contended that it should be permitted to continue, subject to strict controls.⁵¹ The degree of interest in plea bargaining may be gauged by the fact that the Law Society of Upper Canada sponsored two panel discussions that in-

⁴⁶ *Adgey v. The Queen* (1973), 39 D.L.R. (3d) 553, 13 C.C.C. (2d) 177 (S.C.C.). Also see the annotations by A.E. Popple in (1946), 1 C.R. 183 and 260.

⁴⁷ *Brosseau v. The Queen*, [1969] S.C.R. 181 at 190, 2 D.L.R. (3d) 139 at 147, [1969] 3 C.C.C. 129 at 138. *R. v. Johnson* (1945), 62 B.C.R. 199, [1945] 4 D.L.R. 75, 85 C.C.C. 56 (C.A.). Also see *R. v. Haines* (1960), 127 C.C.C. 125 (B.C.C.A.).

⁴⁸ *R. v. Millina* (1946), 62 B.C.R. 532, [1947] 1 D.L.R. 124, 86 C.C.C. 374 (C.A.); *Brosseau v. The Queen*, *id.*; *R. v. Leonard* (1975), 29 C.C.C. (2d) 252 (Ont. C.A.).

⁴⁹ Of course, there may be situations where the courts may set aside a guilty plea even though the defendant was represented by counsel; for example, where defence counsel has become embroiled in a conflict of interest (*R. v. Stork* (1975), 24 C.C.C. (2d) 210 (B.C.C.A.)), or where the defendant is not represented by counsel of his choice (*R. v. Butler* (1973), 11 C.C.C. (2d) 381 (Ont. C.A.)). Furthermore, it must be remembered that a trial judge should investigate where the accused person wishes to withdraw his guilty plea: *R. v. Gagne* (1956), 20 W.W.R. 401 at 408 *per* Johnson J.A. (Alta. C.A.).

⁵⁰ Grosman, *Conflict and Compromise in the Criminal Courts: New Directions in Legal Research* (1969), 11 Crim. L.Q. 292; Grosman, *The Prosecutor: An Inquiry into the Exercise of Discretion* (Toronto: University of Toronto Press, 1969).

⁵¹ Two of those who oppose plea bargaining are Bowen-Coulthurst, *supra* note 44, at 377; and Ratushny, *Plea Bargaining and the Public* (1972), 20 Chitty's L.J. 238. Among those who favour regulated plea bargaining are Cohen, *supra* note 42, at 187-88; Note, *Decisions on Sentencing* (1972), 14 Crim. L.Q. 396 at 398; Editorial (1976), 25 Chitty's L.J. 78; Grosman, *The Prosecutor: An Inquiry into the Exercise of Discretion*, *supra* note 50, at 100-04; and Hyman, *Legal Bargaining* (1970), 18 Chitty's L.J. 266.

cluded rigorous coverage of the ethical issues raised by plea bargaining in the Canadian courts.⁵²

Within the last five years, three major bodies—the Law Reform Commissions of Canada and Ontario, and the Canadian Bar Association—have expressed strong views as to the propriety of plea bargaining. A major problem raised by analysis of these views is the inherent ambiguity that envelopes the very concept of “plea bargaining.” While the Law Reform Commission of Canada calls for the abolition of “plea bargaining,”⁵³ the Canadian Bar Association *Code of Professional Conduct* clearly legitimizes the practice of arriving at “tentative agreements.”⁵⁴ To add to the semantic confusion, the Ontario Law Reform Commission calls for the abolition of plea bargaining, but nevertheless presents a series of ten guidelines for “plea negotiation” or “plea discussions.”⁵⁵ Only the Law Reform Commission of Canada furnishes a definition of plea bargaining—“any agreement by the accused to plead guilty in return for the promise of some benefit.”⁵⁶ However, none of these bodies attempts to draw any clear boundaries between plea bargains and plea negotiations, discussions, or agreements. The one thread that appears to unite them is a revulsion against the notion that a prosecutor may grant some concession to the defendant on the sole ground

⁵² See Panel Discussion on “Problems in Ethics and Advocacy—Plea Discussions,” [1969] *Law Society of Upper Canada Special Lectures* (Toronto: DeBoo, 1969) at 299-311; and Panel Discussion on “Plea and Sentence Negotiations,” in *Proceedings of the Programme on Criminal Law: Representation After Conviction* (Toronto: Law Society of Upper Canada, Department of Continuing Education, October 1970).

⁵³ Law Reform Commission of Canada, *Fourth Annual Report*, *supra* note 2, at 14.

⁵⁴ Canadian Bar Association, *Code of Professional Conduct*, *supra* note 7:

Where, following investigation,

- (a) a defence lawyer bona fide concludes and advises his accused client that an acquittal of the offence charged is uncertain or unlikely,
- (b) the client is prepared to admit the necessary factual and mental elements,
- (c) the lawyer fully advises the client of the implications and possible consequences, and particularly of the detachment of the court, and
- (d) the client so instructs him, it is proper for the lawyer to discuss with the prosecutor and for them *tentatively to agree* on the entry of a plea of “guilty” to the offence charged or to a lesser or included offence appropriate to the admissions, and also on a disposition or sentence to be proposed to the court. The public interest must not be or appear to be sacrificed in the pursuit of an apparently expedient means of disposing of doubtful cases, and all pertinent circumstances surrounding any tentative agreements, if proceeded with, must be fully and fairly disclosed in open court. The judge must not be involved in any such discussions or *tentative agreements*, save to be informed thereof. (Emphasis added.)

⁵⁵ Law Reform Commission of Ontario, *Report on Administration of Ontario Courts, Part II*, *supra* note 9, at 125.

⁵⁶ This is based on the definition found in Ferguson and Roberts, *supra* note 10, at 501:

[T]he practice whereby the accused uses his right to plead not guilty and demand a full trial to bargain for a benefit that is usually related to the charge or the sentence. In other words, plea bargaining means the accused's plea of guilty has been bargained for and some consideration has been received for it.

that it is "expedient" to do so;⁵⁷ unlike the position in the United States,⁵⁸ they feel that reducing the case backlog is never a sufficient motive for showing leniency towards the defendant. In other words, the public's faith in an impartial system of justice must be preserved at all costs:

Justice should not be, and should not be seen to be, something that can be purchased at the bargaining table. Neither the public nor the offender can respect such a system. Once the Crown has decided in the public interest to prosecute a charge, bargaining for a plea should not be used as a substitute for judicial adjudication on guilt or sentence.⁵⁹

The unfortunate analyst who attempts to identify with any degree of clarity the positions espoused by these three bodies is left with the feeling that he knows what they are against, but very little as to precisely what kinds of relationships between Crown and defence counsel are regarded as legitimate. Such ambiguity of presentation leaves the lawyers in the field effectively rudderless in a highly controversial area in the criminal justice system. Since the courts are not prepared to assume control over the exercise of prosecutorial discretion, the whole matter is left in the hands of the individual attorneys general. One of the few provinces in which some attempt has been made to rectify the situation has been Ontario. In 1972, and again in 1976, the Attorney General promulgated a series of principles applicable to "plea discussions":

1. The proper administration of justice is the paramount consideration in all plea discussions, and, as with all the duties of the Crown Attorney due regard must be had for the rights of the accused, the protection of the public and the interest of the victim in accepting the plea of guilty to a lesser or included offence.
2. The Crown Attorney should do nothing to compel a plea of guilty to a lesser number of charges or a lesser or included offence.
3. The Crown Attorney should indict only on those charges on which he intends to proceed to trial or, in trials in the Provincial Judges' Court, the Crown Attorney should, with leave of the court, withdraw those charges on which he does not intend to proceed to trial.
4. The Crown Attorney should not consent to the acceptance of a plea of guilty to an offence which has not been committed.
5. The Crown Attorney should not consent to the acceptance of a plea of guilty to a charge that cannot be prosecuted because it is barred at law.
6. In all discussions with defence counsel the Crown Attorney must maintain his freedom to do his duty as he sees fit. Nothing should be said or done to fetter the freedom of the Crown Attorney and the defence counsel.

⁵⁷ See Law Reform Commission of Ontario, *Report on Administration of Ontario Courts, Part II*, *supra* note 9, at 124:

To accede to the negotiation of pleas of guilty as a method of economizing on means to provide for the proper disposition of caseloads in the criminal courts is to resort to procedures that will corrupt the administration of justice and destroy it as an effective power in the regulation of society. It will destroy public confidence in the courts and create distrust and suspicion of favours. The real ligaments that hold society together are to be found in the fair, just and open procedures of the courts.

Also see the Law Reform Commission of Canada, *Criminal Procedure: Control of the Process*, *supra* note 8. The Canadian Bar Association, *supra* note 7, clearly states that the public interest should not be sacrificed in the service of expedience.

⁵⁸ See, for example, A.B.A., *Standards Relating to Pleas of Guilty*, *supra* note 20, Standard 1.8. Also see the views of Burger C.J. in *Santobello*, quoted *supra* note 21.

⁵⁹ Law Reform Commission of Canada, *Criminal Procedure: Control of the Process*, *supra* note 8, at 46.

7. The Crown Attorney may state to defence counsel the views he may give if asked by the presiding judge to comment on the matter of sentence. The Crown Attorney should not agree to a specific sentence. He may draw the attention of the presiding judge to any mitigating or aggravating circumstances that may appear to him to be relevant and may make submissions concerning the appropriate form and range of sentence. However he should take the clear position that the matter of sentence is strictly for the judge and that any statement that is made cannot bind the Attorney General in the exercise of his discretion whether to appeal against a sentence or not. This discretion of mine however will only be exercised in exceptional circumstances.
8. The Crown Attorney always should consider himself as agent of the Attorney General and, as such, responsible for the proper administration of justice.
9. Apart from exceptional circumstances neither the Crown Attorney nor the defence counsel, either alone or together, should discuss with the judge matters bearing on the exercise of the judge's discretion, in the judge's chambers or any place other than in open court. Where attendance in the judge's chambers is dictated by the circumstances, the Crown Attorney should always request that a court reporter be present to take down the full discussion which should form part of the record of the case. All representations to the judge on which he is to base the exercise of his discretion concerning a plea of guilty should be made in open court.⁶⁰

However, since no procedures are established for enforcing these principles, it is a matter of some debate whether they have any concrete effect in everyday practice. Furthermore, it is clear that the Ontario guidelines make absolutely no attempt to identify the types of cases in which the Crown attorney may properly exercise his discretion to reduce a charge or make some other "concession" to the defendant as a consequence of "plea discussions." The interests of "justice," the public, the victim, and the defendant are left to the exclusive discretion of the Crown attorney; unlike its counterpart in the United States, the court does not have the final word with respect to these matters.

Perhaps in response to the emergence of plea bargaining from the dark realms of the unmentionable into the light of informed public debate, there have been some indications in the 1970's that the Canadian judiciary are reconsidering their previous reluctance to comment on the propriety of prosecutorial plea bargaining. In this decade, courts in both Québec and Alberta have dealt with the issue in a definitive fashion. In Québec, there have been two cases in which the practice has been condemned unequivocally. In

⁶⁰ Memorandum to all Crown Attorneys from the Attorney General of Ontario, June 30, 1972. In 1976 the Attorney General released a memorandum clarifying two aspects of the 1972 guidelines:

1. Expediency in reducing workload is not acceptable as a reason for accepting a plea to a lesser offence or to a lesser number of offences. Expediency in this sense does not include weaknesses in the Crown's case on the major charge or charges, which may be a valid reason for accepting a plea to a lesser offence or to a lesser number of offences.
2. You should be careful to comply with the final sentence of principle Number 9 which reads "All representations to the judge on which he is to base the exercise of his discretion concerning a plea of guilty should be made in open court." This simply means that whenever you accept a plea to a lesser offence or to a lesser number of offences you should state in open court your reasons for doing so. The statement need not be lengthy but should be sufficient to satisfy the public in each case that there is nothing sinister or clandestine in the process of plea discussion.

(Memorandum from Deputy Director of Crime Attorneys, February 26, 1976.)

Perkins v. The Queen, the Court of Appeal held that it could not accept the practice, whether the initiative for plea bargaining came from the Crown or the defence.⁶¹ Similarly, in *A.G. Can. v. Roy*, Hugessen J. held that: "Plea-bargaining is not to be regarded with favour."⁶² It is significant that in *Perkins*, Rinfret J.A. contends, at least where offences carrying a *mandatory* minimum sentence are concerned, that the Crown should not charge a lesser offence solely to avoid the imposition of the penalty prescribed by the statute:

Ou bien l'accusé est coupable et alors il doit subir les peines mandatoires qu'impose la Loi existante, ou il n'est pas coupable et doit être acquitté.

Il est possible que, dans certains cas où la Couronne entretient des doutes sur sa capacité de prouver l'accusation telle que portée, elle accepte un plaidoyer de culpabilité sur une offense moindre qu'elle sait être en mesure d'établir.⁶³

It is not clear whether the Court wished to establish a general principle restricting the power of the Crown to reduce charges in cases where it has the means to prove the greater offence at trial. Of course, the uniform application of such a principle would constitute a singularly effective device for decreasing the incidence of plea bargaining.⁶⁴ The English courts have long exercised a similar power as a means of controlling prosecutorial discretion; in effect, they have insisted that the actual charges laid in a criminal case should reflect accurately the particular factual background to any individual case.⁶⁵ It remains to be seen whether the Canadian courts, as a result of the

⁶¹ [1976] Qué. C.A. 527 at 528, 35 C.R.N.S. 222 at 226 *per* Rinfret J.A.

⁶² (1972), 18 C.R.N.S. 89 at 92 (Qué. Q.B.).

⁶³ *Supra* note 61, at 529 (Qué. C.A.), 226 (C.R.N.S.):

Either the accused is guilty and must face the mandatory sentence imposed by law, or he is innocent and must be acquitted . . . of course, if the Crown doubts its ability to prove a charge, a plea to a lesser offence may be accepted. (Author's translation.)

⁶⁴ The means for implementing the new approach, should the courts wish to do so, may be found in section 534(4) of the *Criminal Code*, R.S.C. 1970, c. C-34, which provides that:

Notwithstanding any other provision of this Act, where an accused pleads not guilty of the offence charged but guilty of an included or other offence, *the court may in its discretion* with the consent of the prosecutor accept such plea of guilty and if such plea is accepted, shall find the accused not guilty of the offence charged. (Emphasis added.)

To date, there is no evidence to suggest that this section is being used regularly as a means of controlling prosecutorial plea bargaining. For discussion of section 534(4), see Panel Discussion on "Plea and Sentence Negotiations," *supra* note 52, at 18-19; and Ontario Law Reform Commission, *supra* note 9, at 121-22. The Commission indicates its belief that the control of plea negotiations should be a matter for the Attorney General, rather than the courts. For the applicable procedures when a plea to an included offence is not accepted by the prosecutor or the Court, see *R. v. Pentiluk* (1974), 21 C.C.C. (2d) 87 (Ont. C.A.).

⁶⁵ See, for example, *R. v. Soanes*, [1948] 1 All E.R. 289, 32 Cr. App. R. 136; *R. v. Bedwellty Justices*, [1970] Crim. L. Rev. 601. In *R. v. Coe*, [1969] 1 All E.R. 65 at 67, 53 Cr. App. R. 66 at 68, Lord Parker C.J. stated that the prosecution should not invite magistrates to proceed summarily on mixed offences, where the facts were serious enough to warrant trial on indictment:

Above all that, there is the proper administration of criminal justice to be considered, questions such as the protection of society and the stamping out of this sort of criminal enterprise, if it is possible. This court would like to say with all the emphasis at its command that the prosecution in a serious case such as this is not acting in the best interest of society by inviting summary trial.

concerns expressed in the *Perkins* case, will assume a more active role in restricting the freedom of Crown counsel to make meaningful concessions to the defendant. In *R. v. Wood*,⁶⁶ the Supreme Court of Alberta appears to have adopted a similar position with respect to the propriety of plea bargaining. In this case, McDermid J.A. quotes, with evident approval, the view of the Law Reform Commission of Canada that plea bargaining is incompatible with a "decent system of criminal justice."⁶⁷ In none of these cases did the court attempt to define what it meant by plea bargaining, nor did it attempt to specify what it regarded as a "proper" pre-trial relationship between prosecutor and defence counsel.

To date, these three cases represent the only *explicit* judicial pronouncements as to the propriety of prosecutorial plea bargaining in Canada. It is indeed curious that the Ontario courts have ignored the issue, since plea bargaining has been a keenly debated topic among legal practitioners in that province,⁶⁸ and since Brian Grosman's work appeared to indicate that the practice existed to a significant extent in metropolitan Toronto.⁶⁹ Nevertheless, even when it has had the opportunity to do so,⁷⁰ the Ontario Court of Appeal has refused steadfastly to take a firm position as to the propriety of plea bargaining.

A recent development of some significance is the emergence of a small body of case law that perhaps reflects some indirect judicial approval of plea bargaining. This line of decisions apparently stems from an Ontario decision in which Judge Graburn of the County Court actively encouraged counsel to submit "sentence agreements" to the Bench.⁷¹ Insofar as such agreements will often be reached after plea bargaining, one may safely assume that the learned Judge was bestowing at least tacit approval upon the practice. In *R. v. Greene*, he said:

I welcome the assistance where counsel are able to arrive at a consensus as to the appropriate sentence in the case. I have indicated in the past that this Court will endeavour to give effect to those representations, unless they should be contrary to principle, or unless they should appear unreasonable on their face.⁷²

⁶⁶ [1976] 2 W.W.R. 135, 26 C.C.C. (2d) 100 (Alta. C.A.).

⁶⁷ *Id.* at 144-45 (W.W.R.), 108-09 (C.C.C.). Although McDermid J.A. dissented from the actual decision in *Wood*, the principles he expounded were approved by the majority of the Court. (See 147 (W.W.R.), 110 (C.C.C.) *per* Moir J.A.).

⁶⁸ See the Panel Discussions, *supra* note 52.

⁶⁹ Grosman, *The Prosecutor: An Inquiry into the Exercise of Discretion*, *supra* note 50.

⁷⁰ See, for example, *R. v. Agozzino*, [1970] 1 O.R. 480, [1970] 1 C.C.C. 380 (C.A.). Extra-judicially, some comment has been forthcoming. For example, in the Panel Discussion on "Problems in Ethics and Advocacy," *supra* note 52, at 302, it is clear that Chief Justice Gale was not convinced of the necessity for plea bargaining.

⁷¹ *R. v. Greene* (1971), 20 C.R.N.S. 238 (Ont. Co. Ct.).

⁷² *Id.* Judge Graburn has dealt with his approach more extensively in the Panel Discussion on "Plea and Sentence Negotiations," *supra* note 52. In fact, he goes so far as to say (at 16) that:

When two experienced members of the Bar, after careful thought, present a proposal in open Court, it should only be rejected for the most compelling reasons, such as the proposal being wrong in principle; otherwise I think the Court should give effect to it.

It is Judge Graburn's view, in *Greene*, *supra* note 71, at 239, however, that Crown

The Ontario Court of Appeal apparently has endorsed the view that counsel may advance a joint sentence submission even where a specific term of imprisonment is concerned.⁷³ The trend towards acceptance of such joint submissions was strengthened further by a recent decision in the Manitoba Court of Appeal, *R. v. Simoneau*.⁷⁴ Although it was emphasized that this case did not involve even the slightest whisper of a plea bargain, the majority of the Court advanced some clear-cut views in relation to the practice of joint sentence submissions:

The extent of Crown counsel's submissions on sentence in Canada may vary from jurisdiction to jurisdiction, or indeed between one Crown counsel and another as suggested by Hogarth in *Sentencing as a Human Process* (1971), at p. 191. But the authority of the Crown to offer suggestions concerning sentence is clear. . . .

. . . .

It has been suggested that it is objectionable for counsel to mention a specific term or, as a variation of making a specific recommendation, to suggest a range of sentence. Most often neither Crown counsel nor counsel for the accused will name a specific term nor suggest a range but will confine their suggestion to the type of sentence. However, I see nothing wrong in being specific where the circumstances call for it. Once it is accepted that Crown counsel can make a submission on sentence (whether in favour of severity or leniency) it should be possible to permit particularity. Submission on sentence must of course be based on material in the record. Such submissions do not contravene the well-established doctrine that the Court is not interested in personal opinions of counsel In my view, there is no purpose in creating an artificial restraint on what counsel may say to the Court by declaring as a matter of law that counsel should not be permitted to make specific recommendations. . . .

All of this is subject to the underlying premise that any recommendation, whether general or specific, will not fetter the discretion of the Court. Anything counsel may say will be no more than of help to the Judge making the decision. It must be clear to everyone that the comments of counsel are only submissions, which the Court may accept or reject. It is the Judge's responsibility and his alone to decide on the fitness of a sentence.

On the question of a joint submission about sentence, counsel for the Association supported the practice and said that it has never been suggested that counsel for the Crown and defence could bind a trial Judge by agreeing to a particular disposition. . . .

. . . .

In my view, it is not objectionable for a properly arrived at joint submission to be made nor, where the circumstances call for it, is it objectionable to recommend a specific term, subject always to the overriding discretion of the Court to accept or reject any recommendation.⁷⁵

On the other hand, it may be noted that in the *Wood* case, McDermid J.A. clearly rejected such an approach, at least as far as the Alberta courts are concerned, when he stated his belief that Crown counsel generally should play a restricted role in the sentencing process:

Crown Counsel is entitled to make a submission to the Judge as to sentence.

counsel is entitled to suggest only the form of the sentence—the quantum of sentence is a matter falling within the “absolute jurisdiction of the Court.” Judge Graburn's approval of the plea bargaining process is clearly based upon his experience as a Crown attorney in Toronto. See the Panel Discussion on “Plea and Sentence Negotiations,” *supra* note 52, at 7.

⁷³ *R. v. Lapointe* (1978), 2 W.C.B. 119 (Ont. C.A.).

⁷⁴ [1978] 3 W.W.R. 461, 40 C.C.C. (2d) 307 (Man. C.A.).

⁷⁵ *Id.* at 463-65 (W.W.R.), 314-16 (C.C.C.).

However, in my opinion, the preferable practice is not to do so unless he is requested by the Judge for a submission.⁷⁶

Broken Plea Bargains

While most Canadian courts have avoided committing themselves to a firm stand on the propriety of plea bargaining, they certainly have not been able to side-step the unfortunate consequences of those plea bargains that have turned sour.⁷⁷ Unfortunately, their approach to the grave problems posed by broken plea bargains by no means has demonstrated the virtue of consistency.

All of the courts that have considered the issue have been able to agree on one basic principle at least. This principle is that, whatever the nature of an agreement as to sentence may be, it cannot bind the trial judge in any manner whatsoever. Indeed, Canadian judges have rejected emphatically any move that appears to impinge upon their absolute discretion as to sentencing. As the Québec Court of Appeal put it, "Counsel for the Crown is clearly entitled to suggest a sentence, but it is the prerogative of the Court to accept or to reject such suggestion."⁷⁸ In the few cases where the Crown has not carried out its part of the agreement *at trial*, the view of the courts appears to be that the defendant should be entitled (depending on the circumstances) either to specific performance of the agreement,⁷⁹ or to withdraw his plea of

⁷⁶ *Supra* note 66, at 145 (W.W.R.), 109 (C.C.C.).

⁷⁷ See, generally, Cohen, *supra* note 42, at 185-88; and Ruby, *Sentencing* (Toronto: Butterworths, 1976) at 71-77.

⁷⁸ *R. v. Mouffe* (1972), 16 C.R.N.S. 257 at 261 *per* Rinfret J.A. (Qué. C.A.). Also see *R. v. Johnston*, [1970] 2 O.R. 780, [1970] 4 C.C.C. 64 (C.A.); *R. v. Fleury* (1971), 23 C.R.N.S. 164 (Qué. C.A.); *R. v. Kirkpatrick*, [1971] Qué. C.A. 337; *R. v. Wood*, *supra* note 66; *R. v. Simoneau*, *supra* note 74; *R. v. Cusack* (1978), 41 C.C.C. (2d) 289 (N.S.S.C., App. Div.); *R. v. Thomas*, [1968] 1 O.R. 1, [1968] 2 C.C.C. 84 (C.A.); and *R. v. Pretty* (1971), 2 N. & P.E.I. R. 10, 5 C.C.C. (2d) 332 (P.E.I.S.C., C.C.A.). Nevertheless, as Ruby points out, *supra* note 77, at 75, there are many factors that may operate to persuade the trial judge to follow the sentencing recommendations of the Crown. In *Fleury*, at 178-79, Turgeon J.A. agreed with the comments of the trial judge:

The trial judge is inclined, particularly when faced with a plea of guilty, to adopt the suggestion put forward by counsel for the Crown, since the latter has received the confidential report of the investigating officer and is as a result familiar with certain information and with certain extenuating circumstances of which the judge may be totally ignorant.

See the similar views expressed by Schultz J.A. in *R. v. Clarke* (1959), 124 C.C.C. 284 at 287-88 (Man. C.A.).

⁷⁹ See, for example, *R. v. Brown* (1972), 8 C.C.C. (2d) 227 (Ont. C.A.). In this case the defendant agreed to plead guilty if Crown counsel would inform the Court that he was not asking that the sentence be consecutive to the sentence the defendant was then serving. The defendant pleaded guilty, but the Crown broke its part of the bargain and, in effect, asked the Court to impose a consecutive sentence. The defendant appealed the sentence that had been imposed and the Ontario Court of Appeal changed the sentence to a concurrent term. Also see *R. v. Smith*, [1975] 3 W.W.R. 454, 8 C.C.C. (2d) 291 (B.C.S.C.). In this case, the Crown had undertaken not to proceed with certain charges if the defendant were to hand over a quantity of marijuana to the police. Although the defendant kept his side of the bargain, the Crown nevertheless laid charges in violation of its undertaking. Berger J. issued a writ of prohibition with respect to those charges on the basis that the Crown's conduct constituted an abuse of the process of the Court. For a discussion of the question of whether undertakings made by federal prosecutors may bind their provincial counterparts, see *R. v. Betesh* (1976), 35 C.R.N.S. 238 (Ont. Co. Ct.).

guilty and undergo a new trial.⁸⁰ In *A.G. Can. v. Roy*, Hugessen J. suggested that the following procedure be adopted so as to avoid any misunderstandings on the part of the defendant:

Where there has been a plea of guilty and Crown Counsel recommends a sentence, a Court, before accepting the plea, should satisfy itself that the accused fully understands that his fate is, within the limits set by law, in the discretion of the judge, and that the latter is not bound by the suggestions or opinions of Crown Counsel. If the accused does not understand this, the guilty plea ought not to be accepted.⁸¹

Unhappily, the uniformity of judicial approach manifested in these circumstances is dissipated completely when the broken plea bargain involves the appeal of the attorney general against an "agreed sentence," rather than the failure of Crown counsel to fulfil his commitment as to sentence before the trial judge.

One of the most common situations in which a plea bargain has been repudiated unilaterally occurs where the Crown decides to appeal against a sentence that has been imposed by the trial judge with the full consent of both counsel. At trial, Crown counsel will have agreed to maintain a certain position with respect to sentence; in exchange for a plea of guilty, he will have undertaken either to make an active submission in favour of an "agreed sentence" or, alternatively, to indicate at least his acquiescence in the contentions advanced by defence counsel. There have been a number of cases in which the attorney general has launched an appeal against the "agreed sentence" on the grounds that the "bargain" fails to take adequate account of the interests of society as a whole. What has been the position of the Courts in these difficult circumstances?

At one extreme, there are two recent cases from Québec⁸² in which the Court of Appeal allowed the Crown's appeal and increased the sentences imposed on the defendants. Significantly, in neither case was any opportunity afforded to the defendant to withdraw his plea and take a new trial. In light of the fact that the defendants in these cases pleaded guilty predominantly as a consequence of their expectations as to the nature of the sentence to be imposed, the approach of the Court has grave and disturbing implications for the system of criminal justice. No doubt the Court's views as to the propriety of plea bargaining⁸³ shaped the course of its decisions, but it is indeed questionable whether these particular defendants should have been sacrificed as an object lesson in the Court's crusade against plea bargaining.

⁸⁰ See *R. v. Ah Tom*, *supra* note 39; *R. v. Stone*, *supra* note 39.

⁸¹ *Supra* note 62, at 92.

⁸² *R. v. Mouffe*, *supra* note 78; *R. v. Kirkpatrick*, *supra* note 78. In *Kirkpatrick*, the Court said, at 338 (translation):

It would be desirable if counsel for the Attorney-General were to refrain from making statements which their superiors subsequently find themselves forced to retract. Nevertheless, we are not bound by such statements, and must, as a result assume the responsibilities which are properly ours.

⁸³ These views became very clear in the later case of *Perkins v. The Queen*, *supra* note 61.

At the other extreme are two cases from Saskatchewan⁸⁴ and Ontario⁸⁵ in which the respective Courts of Appeal indicated that they felt bound to enforce the original undertaking made by Crown counsel at trial even though they had serious doubts as to its propriety. In the Ontario case of *R. v. Agozzino*, the Court of Appeal said:

There is evidence before us to indicate that had it not been for the position taken by the Crown which was subsequently adopted by the Magistrate, the accused would not have pleaded guilty. The circumstances, therefore, dictate a dismissal of the Crown's appeal as to sentence even though, had we thought ourselves at liberty to consider its propriety, we probably would have come to a different conclusion. . . .

In effect the appeal repudiates the position taken by Crown counsel at the trial and we do not care to give effect to that repudiation.⁸⁶

Of course, this approach is not necessarily preferable to that adopted by the Québec Court of Appeal in the two cases mentioned above. After all, while the Court may be treating the defendant with the utmost fairness, it may nevertheless be possible that the interest of society in general, and of the victim in particular, may be overlooked completely. Neither approach, therefore, can be accepted with any degree of equanimity.

Lying somewhere between these extremes are two cases from Québec,⁸⁷ and one case from Prince Edward Island,⁸⁸ in which the Court takes the view that, while the Court of Appeal cannot be bound by the position that Crown counsel may have taken at trial, it nevertheless will only interfere with the sentence imposed in "exceptional circumstances." Perhaps this half-way house approach is represented best by the judgment of Hugessen J. in *A.G. Can. v. Roy*:

⁸⁴ *R. v. Christie* (1956), 18 W.W.R. 442, 115 C.C.C. 55 (Sask. C.A.). In spite of a vigorous dissent by McNiven J.A., the majority opinion of Gordon J.A., at 443 (W.W.R.), 56 (C.C.C.), dispenses with the issue in one paragraph:

So far as the accused Wolfe is concerned, the agent of the Attorney-General consented to suspended sentence as against him. We do not think that under these circumstances an appeal by the Crown should be entertained, although we are of the opinion that he was treated very lightly.

For consideration of the issue whether a settlement, which includes waiver of a right to appeal from reassessments of income tax, is valid in the light of a threat of prosecution, see *Smerchanski v. MNR*, [1977] 2 S.C.R. 23, 68 D.L.R. (3d) 745.

⁸⁵ *R. v. Agozzino*, *supra* note 70. Once again the Court deals with the issue without any attempt to analyse the alternative courses of action open to them.

⁸⁶ *Id.* at 481-82 (O.R.), 381-82 (C.C.C.) *per* Gale C.J.O. In the case of *R. v. LeBlanc*, *R. v. Long* (1938), 13 M.P.R. 343, [1939] 2 D.L.R. 154, 71 C.C.C. 232 (N.B.C.A.), the Court gave some indication that they might adopt the same approach as that manifested in *Christie* and *Agozzino*. In the *LeBlanc* case, the Court rejected the defendants' contention that Crown counsel had made an undertaking not to appeal. However, Baxter C.J. said that if such a promise had been made and subsequently broken, "it might afford some reason for this Court to say that it would not act under such circumstances." (at 351 (M.P.R.), 160 (D.L.R.), 239 (C.C.C.))

⁸⁷ *R. v. Fleury*, *supra* note 78; and *A.G. Can. v. Roy*, *supra* note 62. It may be noted that the statements of the Courts relating to the principles to be applied in the case of a broken bargain appear to be *obiter*, since the Courts felt that the sentences imposed were in fact correct in terms of general sentencing principles.

⁸⁸ *R. v. MacArthur* (1978), 15 N. & P.E.I. R. 72, 39 C.C.C. (2d) 158 (P.E.I.S.C., App. Div.).

The Crown, like any other litigant ought not to be heard to repudiate before an appellate court the position taken by its counsel in the trial court, except for the gravest possible reasons. Such reasons might be where the Crown can demonstrate that its counsel had in some way been misled, or finally, where it can be shown that the public interest in the orderly administration of justice is outweighed by the gravity of the crime and the gross insufficiency of the sentence.⁸⁹

Undoubtedly, the greater flexibility of this approach renders it infinitely more attractive than the two other lines of authority discussed. However, it too has been subjected to criticism. For example, it has been suggested that the principle laid down by Hugessen J. is far too vague to be of any practical assistance to a defendant who wishes to enter into a plea bargain with the Crown. To those commentators who believe that the plea bargaining process has become "an integral part of the administration of justice," the failure to establish a specific rule as to when the Crown may override successfully a sentence agreement made at trial is regarded as an unjustifiable deterrent to those accused persons who seek to participate in the process.⁹⁰ Of course, such an argument has no persuasive force for those who reject the propriety of all plea bargaining, and it is perfectly clear that Hugessen J. did not base his approach on the assumption that prosecutorial plea bargaining is a legitimate practice; indeed, he said later in his judgment:

The Crown may feel that it has made a bad bargain, but the solution to that must surely be for the Crown to make no bargains at all.⁹¹

On the other hand, this approach does not meet entirely the objections of those who feel that the Attorney General should have complete freedom to appeal against those sentences that do not adequately protect the interests of justice or the victim of the crime. A fourth—and perhaps the most satisfactory—approach to the problem has manifested itself in the recent judgment of the Supreme Court of Alberta in *R. v. Wood*. In that case, the Court adopted the following principle:

A position taken by Crown Counsel before a trial Judge is a circumstance to be taken into consideration, but we cannot be bound by any such position taken and are not willing to restrict the appeal of the Crown by such a consideration.⁹²

The merit of this approach, of course, is that it preserves the freedom of the court to fulfil its legitimate role as a supervisory body over sentencing practices. Furthermore, there are suggestions in the case to the effect that, where the court feels the sentence imposed is insupportable in the circumstances, the defendant should be entitled to a new trial.⁹³ This result is an approach

⁸⁹ *Supra* note 62, at 93.

⁹⁰ See *Decisions on Sentencing*, *supra* note 51.

⁹¹ *A.G. Can. v. Roy*, *supra* note 62, at 93.

⁹² *R. v. Wood*, *supra* note 66, at 146 (W.W.R.), 110 (C.C.C.) *per* McDermid J.A.

⁹³ McDermid J.A. felt that Wood should have been given a new trial (*id.*). However, the majority of the Court believed that the defendant would be prejudiced unfairly if such a course were taken in the particular circumstances of this case (at 147 (W.W.R.), 111 (C.C.C.)). Wood had, for example, been interviewed by psychiatrists after pleading guilty—their evidence would have been "competent and compellable" in a new trial. In addition, Wood had strictly abided by the terms of a probation order for about one year and the Court felt that it would be unfair to alter the sentence after such a long delay.

that is both eminently fair to the defendant and entirely satisfactory from the point of view of the broader interests of society as a whole. Significantly, this is precisely the approach recommended by the American Bar Association in their *Standards Relating to Guilty Pleas*, and by the American Law Institute's *Model Code of Pre-Arrest Procedure*.⁹⁴

There is one type of broken bargain that deserves a separate comment. It is perhaps best illustrated by the case of *R. v. Kennedy*.⁹⁵ Kennedy was charged with criminal negligence causing death, and with impaired driving. As the result of a plea bargain struck between defence counsel and the Crown, he entered a plea of guilty to the lesser charge, and the Crown consequently withdrew the charge of criminal negligence. Kennedy was sentenced to a short period of confinement and to suspension of his driving licence. Shortly after the sentence had been served, the husband of the accident victim instigated a private prosecution for causing death by criminal negligence—the charge previously withdrawn by the Crown. The Attorney General of Ontario intervened in these proceedings and, after a preliminary inquiry, Kennedy was indicted. Kennedy applied to the Chief Justice of the High Court to stay proceedings on the ground that to carry on with them would constitute an abuse of the process of the Court. The application was refused by the Chief Justice, and the Ontario Court of Appeal rejected an appeal against that decision on the technical grounds that it lacked jurisdiction to intervene at that particular stage of the case.⁹⁶ Unfortunately, therefore, the Court of Appeal did not deal with the merits of the case and failed to lay down any principle for dealing with the defendant's situation, i.e., where a plea bargain is broken, not by the Crown, but by the intervention of a private prosecutor. It is submitted that the approach adopted in *R. v. Wood* constitutes the most equitable method of dealing with the consequences of such a broken plea bargain. Such an approach has the undoubted merit of establishing a simple principle that may be applied to all cases of broken plea bargains.

It is significant that in only two of the cases dealing with broken plea bargains did the court express a firm view as to the propriety of plea bargaining. Coupled with *Perkins*, these represent the only definitive statements of the Canadian courts on this issue. However, it must not be assumed that the approach of the Canadian courts to the propriety of prosecutorial plea bar-

⁹⁴ See American Bar Association Project on Minimum Standards for Criminal Justice, *Standards Relating to Pleas of Guilty*, *supra* note 20. Two amendments provided for the procedure outlined in the text: Standards 2.1(5) and 3.3(b). See the similar approach of the American Law Institute, *A Model Code of Pre-Arrest Procedure*, *supra* note 22, at s. 350.6.

⁹⁵ [1972] 2 O.R. 754, 6 C.C.C. 564 (C.A.).

⁹⁶ *Id.* at 756 (O.R.), 565 (C.C.C.) *per* Aylesworth J.A. As to the powers of the private prosecutor, see, generally, Burns, *Private Prosecutions in Canada: The Law and a Proposal for Change* (1975), 21 McGill L.J. 269; and Kaufman, *The Role of the Private Prosecutor: A Critical Analysis of the Complainant's Position in Criminal Cases* (1960-61), 7 McGill L.J. 102. In *R. v. McGrath* (1944), 18 M.P.R. 71, [1944] 3 D.L.R. 669, 81 C.C.C. 303 (N.S.S.C.), there is a very slight indication that the Court may have been willing to allow the defendant to withdraw his plea in such circumstances. However, the Court found that the defendant knew the position maintained by the private prosecutor before he entered the plea of guilty.

gaining is unique within the context of those legal systems whose roots are in the English common law tradition. In England, the courts have only discussed the issue of plea bargaining in the situation where the judge has become involved in pre-trial discussions,⁹⁷ while in Australia there appears to have been practically no judicial response to the issue whatsoever.⁹⁸ In the immediate future we may expect that the persistent public clamour over plea bargaining will result in some sort of change in its presently lugubrious status. Either the courts will assume more responsibility for regulating the pre-trial relationship between defence and prosecution counsel (along the lines of the American Federal Courts), or the attorneys general will attempt to develop some device for the internal regulation of this relationship.⁹⁹ In any event, it is to be hoped that the present state of the law—in which no party to the criminal trial process really knows what types of negotiation are deemed to be proper—will not be permitted to continue without firm protest.

IV. EMPIRICAL RESEARCH INTO PLEA BARGAINING IN CANADA

In spite of their forceful advocacy in the cause of eliminating prosecutorial plea bargaining, the Law Reform Commission of Canada does not appear to have based its recommendations upon the foundations of empirical research. It is submitted that we really do not know enough about the nature and extent of plea bargaining across Canada to be able to pontificate with equanimity as to its future within our system of justice. Perhaps the Commission should have determined both the precise extent to which Canadian courts rely on the entry of a guilty plea, and the actual incidence of plea bargaining across Canada, before making such sweeping statements about the practice. Indeed, it may be contended that the empirical data available at present are so meagre that the contemplation of radical changes in the trial court process is premature at best, and ill-advised at worst.

⁹⁷ See *R. v. Turner*, [1970] 2 Q.B. 321, [1970] 2 All E.R. 281, 54 Cr. App. R. 352; *R. v. Brook*, [1970] Crim. L. Rev. 600 (C.A.); *R. v. Plimmer* (1975), 61 Cr. App. R. 264, [1975] Crim. L. Rev. 730 (C.A.); *R. v. Cain*, [1975] 2 All E.R. 900, [1976] Crim. L. Rev. 464 (C.A.); and *R. v. Deary*, [1977] Crim. L. Rev. 47. Significantly, the Court of Appeal missed the opportunity to discuss the propriety of pre-trial discussions between the prosecution and defending counsel in the case of *R. v. Hall*, [1968] 2 Q.B. 788, 52 Cr. App. R. 528. A recent study suggests that plea bargaining probably exists to a quite considerable extent in the British jurisdiction of Birmingham. Over a 15 month period, the researchers interviewed 121 defendants who had changed their pleas from "not guilty" to "guilty" just prior to trial. Of these persons, 86 claimed to have been persuaded to plead guilty or were offered "deals" by their barristers. Significantly, strenuous efforts apparently were made by representatives of both the Law Society and the Bar Council to prevent publication of these findings. See Baldwin and McConville, *Negotiated Justice: Pressures to Plead Guilty* (London: Martin Robertson, 1977).

⁹⁸ See Westling, *Plea Bargaining: A Forecast for the Future* (1976), 7 Sydney L. Rev. 424. The first case in which the issue of plea bargaining has been raised is the recent (unreported) Victoria case of *Bruce v. The Queen*, which went to the High Court of Australia. See Sallmann, *Book Review* (1978), 11 A.N.Z. J. of Criminology 121 at 123.

⁹⁹ In general, the Law Reform Commission of Canada appears to prefer the development of such internal regulation of prosecutorial discretion to the expansion of the sphere of judicial control. See Working Paper No. 15, *supra* note 8, at 59-60. Also see the similar contention expressed in Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion* (1972), 19 U.C.L.A. L. Rev. 1.

A. *Incidence of Guilty Pleas in Canada*

There are no studies in Canada that show the percentage of persons who plead guilty in any single jurisdiction over an extended period of time. Instead, there are a handful of studies that focus upon the practices existing in particular jurisdictions during specific periods.¹⁰⁰ Nevertheless, there have been Canadian commentators who have exaggerated grossly the extent to which Canadian trial courts rely upon the entry of guilty pleas as a means of disposing of criminal cases. For example, Hogarth, in a study paper prepared for the Law Reform Commission of Canada, contends that 90 percent of defendants to criminal charges in Canada plead guilty,¹⁰¹ while Hagan, in a recent addition to Canadian criminological literature,¹⁰² cites the same figure without referring to any source whatsoever. Examination of the empirical data that have been released in Canada indicate that these commentators have seriously distorted the nature of the court process.

Friedland reported that in the 1,476 cases he observed before the Magistrates' Courts of the City of Toronto in 1964, 69 percent of the defendants pleaded guilty.¹⁰³ The Canadian Committee on Corrections stated in 1969 that while statistics as to the rates of guilty pleas are lacking, "it is believed by law enforcement officers that at least from 40 to 50 percent of all convictions for indictable offences are the result of pleas of guilty."¹⁰⁴ The Canadian Civil Liberties Trust conducted a study of Magistrates' Courts in the cities of Halifax, Montreal, Toronto, Vancouver, and Winnipeg during the month of January, 1970, and concluded that the overall rate of guilty pleas was 68 percent, with a high of 80 in Winnipeg and a low of 59 in Toronto.¹⁰⁵ Hogarth studied a sample of Magistrates from 37 jurisdictions in Ontario during 1966.¹⁰⁶ On the basis of a sample of some 2,396 cases, Hogarth concluded that nearly four out of five of those persons who were *convicted* had entered a plea of guilty; however, the author does not indicate the percentage of persons *charged* who pleaded guilty.

Recent sophisticated computer analyses of criminal cases in three different Canadian jurisdictions also suggest that the notion that 90 percent of defendants plead guilty is a dangerous myth. Hann's study of the Magistrates'

¹⁰⁰ Grosman, *The Prosecutor: An Inquiry into the Exercise of Discretion*, *supra* note 50; Hartnagel, *Plea Negotiations in Canada*, *supra* note 12; Wynne and Hartnagel, *Race and Plea Negotiations: An Analysis of Some Canadian Data*, *supra* note 12; Hagan, *Parameters of Criminal Prosecution: An Application of Path Analysis to a Problem of Criminal Justice*, *supra* note 12; and Klein, *Let's Make a Deal: Negotiating Justice*, *supra* note 12.

¹⁰¹ *Studies on Sentencing* (Ottawa: Information Canada, 1974) at 57.

¹⁰² *The Disreputable Pleasures*, (Toronto: McGraw-Hill Ryerson, 1977) at 159.

¹⁰³ *Detention Before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts* (Toronto: University of Toronto Press, 1965) at 89.

¹⁰⁴ *Toward Unity: Criminal Justice and Corrections (Oumet Report)* (Ottawa: Queen's Printer, 1969) at 134.

¹⁰⁵ Canadian Civil Liberties Education Trust, *Due Process Safeguards and Canadian Criminal Justice* (Toronto: Canadian Civil Liberties Education Trust, 1971) at 82-83. For an excellent critique of the methodological limitations of this study, see Wilkins and Jeffries, *Due Process Safeguards and Canadian Criminal Justice: A Critique* (1971-72), 14 *Crim. L.Q.* 220.

¹⁰⁶ *Sentencing as a Human Process* (Toronto: Carswell, 1971) at 270.

Courts in Toronto during the years 1970 and 1971 unearthed a significantly lower rate of guilty pleas; on the basis of a sample of 1,655 cases, he concluded that 43.5 percent of accused persons pleaded guilty.¹⁰⁷ Similarly, Mackaay furnishes some interesting data as to the rates of guilty pleas in the Montreal court system. In a study of some 555 cases dealt with by the "Court House" and 200 cases processed by the "Municipal Court," Mackaay discovered that 63.5 percent of defendants pleaded guilty at the Court House while 31.4 percent was the corresponding figure at the Municipal Court.¹⁰⁸ Finally, a very recent study of the B.C. Provincial Courts provides a detailed profile of the fate of accused persons in the court process.¹⁰⁹ In an analysis of 50,000 cases which passed through the Provincial Courts during the first six months of 1976, it was revealed that 49 percent of defendants entered guilty pleas while, in 22 percent of cases, the Crown withdrew or stayed the charges. Of those cases that actually proceeded to trial, 20 percent resulted in conviction, 7 percent in acquittal, and 2 percent in committal to a higher court.

On the basis of these studies, it is well nigh impossible to establish an accurate overall estimate of the extent to which criminal cases are disposed of by means of the guilty plea. About the only statement that may be proffered with any degree of certainty is that there are significant variations in the rate of guilty pleas as between different jurisdictions in Canada. In any event, however, the 90 percent rate quoted by Hogarth and Hagan is by no means representative of the findings published in the available Canadian research.

B. *The Nature and Extent of Plea Bargaining in Canada*

In 1974, Ferguson and Roberts wrote that "since there is [sic] so little empirical data on the extent and nature of plea bargaining in Canada, it will be necessary to assume for the sake of argument that many plea bargaining practices either exist or *could exist* in one or more regions."¹¹⁰ Subsequently, the Law Reform Commission of Canada based its important policy recommendations upon the Ferguson and Roberts report. It is indeed curious that the Commission was prepared to instigate potentially far-reaching reforms in the criminal justice system on the basis of intuition and hearsay.

In Canada, there have been very few rigorous attempts to study plea bargaining. The pioneering study in this area was undertaken by Brian Grosman.¹¹¹ Drawing upon both his own experience as a prosecutor and upon a series of interviews with Crown attorneys in the County of York, Ontario, Grosman suggested that plea bargaining was an important element in a well-

¹⁰⁷ *Decision Making—The Canadian Criminal Court System: A Systems Analysis, Vol. II* (Toronto: University of Toronto Press, 1973) at 313.

¹⁰⁸ *Les chemins de la justice—étude du fonctionnement des cours criminelles à Montréal* (Montréal: Groupe de recherche en jurimétrie, Faculté de droit, U. de M., 1976) at 32.

¹⁰⁹ Ministry of the Attorney General for B.C., *Monthly Court List for January to June 1976*. (Unpublished Internal Report.)

¹¹⁰ *Supra* note 10, at 500.

¹¹¹ *The Prosecutor: An Inquiry into the Exercise of Discretion*, *supra* note 50.

established pattern of accommodations and concessions routinely exchanged between Crown attorneys and "favoured" defence counsel. While Grosman's trail-blazing study should not be under-estimated, it must nevertheless be noted that his observations are based on impression and hearsay rather than systematic research of the actual practices associated with plea bargaining. Furthermore, some reviewers have contended strongly that his findings would not necessarily be applicable to other jurisdictions in Canada.¹¹² Since Grosman's work was avowedly "speculative," we cannot draw any conclusions as to the true extent of plea bargaining in the jurisdiction studied; although one prosecutor is cited as having estimated that about 20 percent of guilty pleas before the Magistrates' Courts were the fruits of plea bargaining.¹¹³

The first quantitative research into plea bargaining in Canada was conducted by Wynne and Hartnagel in a "prairie" city during the years 1972 and 1973.¹¹⁴ The researchers examined the files of all persons charged with Criminal Code offences where there appeared to be "evidence" of plea bargaining between Crown and defence counsel. The "evidence" in question consisted of the presence of *all* the following elements: the original charge had been changed, a "not guilty" or reserved plea had been altered to a plea of "guilty," and the file contained correspondence between Crown and defence counsel and/or written comments or notes indicating that the Crown had reduced a charge in exchange for a guilty plea. Wynne and Hartnagel scrutinized the data collected for evidence of the effects upon plea negotiation of three legal factors: the defendant's criminal record, the presence of multiple and/or repetitive charges, and the nature of the offence. In addition, they attempted to assess the impact upon plea negotiations of three extra-legal factors: the defendant's race, his occupation, and whether he was represented by counsel.

The authors conclude that, since the Crown's decision whether to negotiate a plea is not affected by the accused's previous record, the experienced offender does not appear to have any particular advantage in the system of negotiation. Furthermore, they discovered that, except in relation to native Indians, the likelihood of plea bargaining is increased significantly by the existence of multiple charges. Perhaps it is not surprising that they also concluded that bargaining was most likely to occur in relation to driving offences involving alcohol. In general, the authors demonstrate that the likelihood of bargaining varies considerably according to the type of offence. For example, while bargaining was present in 27 percent of indictable offences, it was discovered that virtually no summary offences were the subject of negotiation.¹¹⁵ Another significant finding was that the "benefits" of plea bargaining were restricted almost exclusively to those accused persons represented by counsel. Finally, the researchers conclude that native Canadians do not experience the same benefits of plea bargaining as do their white counterparts under similar conditions.

¹¹² Bowen-Coulthurst, *Book Review* (1970), 20 U. Toronto L.J. 494 at 496.

¹¹³ Grosman, *supra* note 50, at 32.

¹¹⁴ *Supra* note 12.

¹¹⁵ *Id.* at 48.

In a similar vein, John Hagan's study of the role played by legal, procedural and extra-legal factors in the sentencing process indicates that the likelihood of plea bargaining is affected significantly by the existence of multiple charges.¹¹⁶ In sharp contrast to the findings of Wynne and Hartnagel, however, Hagan concludes that the likelihood of plea negotiation, measured simply by the presence of charge reduction, is not affected significantly by the accused person's race. However, Hagan's study of 1,018 offenders, which was undertaken in a "medium-sized western Canadian city," concludes that the sentence that was ultimately imposed was primarily a reflection of the seriousness of the initial charge and the defendant's prior record rather than of such procedural variables as charge alteration and initial plea.

The only other study of plea bargaining in Canada is John Klein's recent book, *Let's Make A Deal*.¹¹⁷ Klein's research was based on interviews with 115 inmates in a maximum security federal penitentiary. The author directed his attention to the types of "deal" offenders had struck "in interaction with agents in the criminal justice system to minimize the possible punitive consequences of (their illegal activities)." Klein discovered that 53 percent of offenders claimed that they had been enmeshed in "deals" of various kinds.¹¹⁸ Significantly, these alleged "deals" occurred primarily in the context of relationships between the offenders and the police, while only a minority of such "deals" were the outcome of the involvement of Crown counsel. The bargains allegedly struck involved such significant benefits to the offender as the dropping of charges against his accomplice, particularly where his partner happened to be his girlfriend or wife, the dropping of charges against the offender himself, the facilitation of bail, and arrangements for the securing of a lenient sentence. In exchange for these benefits, the police allegedly gained by the recovery of such items as illegal explosives, firearms, stolen property, and drugs. Furthermore, the police benefited in a more general sense because they improved their clearance rates and, most importantly, they preserved the flow of that life-blood of any police department—information.¹¹⁹

The major shortcoming of all these studies is that the true nature and extent of plea bargaining within any given Canadian jurisdiction cannot be assessed accurately solely by means of inference from secondary sources.¹²⁰ Specifically, all of the studies base their conclusions upon information gleaned from official files and interviews. While such information is the source of

¹¹⁶ *Supra* note 12.

¹¹⁷ *Supra* note 12.

¹¹⁸ *Id.* at 132.

¹¹⁹ *Id.* at 123-28.

¹²⁰ *Id.* at 21-123, generally. For example, the studies by Hartnagel, and Wynne and Hartnagel probably underestimated the amount of plea bargaining. These researchers only counted cases as "bargains" when there was evidence that the original charge had been changed from "not guilty" or "reserved" to "guilty," and when there was evidence from correspondence or written comments in files indicating that "deals" had been agreed to. It seems reasonable to assume that not all, and probably only a few, bargains resulted in such written notes and/or correspondence. Similarly, Hogarth's data probably represent an underestimate of plea bargaining in that he refers only to the numbers of guilty pleas among those convicted. On the other hand, Hagan's data are probably over-estimations of the amount of plea bargaining because he uses the number of "charge reductions" as his measure of plea bargaining.

undeniably fruitful conclusions, it nevertheless must be considered in conjunction with research that is based on actual observation of the process of plea bargaining.¹²¹ Failure to observe the day-to-day interaction of Crown and defence counsel merely results in a complete lack of clarity as to the true nature of the various forms of relationships existing between these participants in the court process. It may be contended that any study that bases its conclusions upon inference from official files or from interviews is necessarily vulnerable to the possibility that the relationship between Crown and defence counsel is portrayed in the light of the researcher's own *a priori* assumptions rather than in the light of the complex and disparate types of interaction that may be identified by close observation of the routine behaviour of defence and prosecuting counsel. Significantly, none of the studies discussed attempts to draw any distinction between true "bargains," tentative negotiations, and mere discussions. It may well be, however, that this patent lack of clarity renders any discussion of what is compendiously labelled as "plea bargaining" or "plea negotiation" extremely hazardous—any attempt to formulate a Canadian policy relating to "plea bargaining" can only be considered both rash and premature.

In conclusion, while the few studies of plea bargaining that have been undertaken in Canada have yielded invaluable information, the state of our knowledge about the practice can still only be termed "embryonic." Until empirical research clarifies the essential nature of the different types of interaction presently characterized by "plea bargaining," our knowledge will of necessity continue to be both crude and vague. As Brian Grosman so aptly described the situation in 1970, "we have yet to ask the crucial questions in order to discover under what conditions or situations discretion is exercised."¹²²

V. THE LAW REFORM COMMISSION AND THE ABOLITION OF PLEA BARGAINING

As we have seen, the Law Reform Commission of Canada has recommended the complete abolition of prosecutorial plea bargaining. They suggest that the goal may be achieved by the employment of two relatively simple measures.¹²³ First, the Commission contends that prosecutorial plea bargaining should be abolished by administrative fiat; in other words, directives prohibiting the practice should be issued by the appropriate attorneys general to all Crown counsel under their jurisdiction. Second, it is suggested that an effective method of eliminating plea bargaining is judicial control; judges should "use their influence" to discourage the practice. Although the Commission does not explain exactly how judges should exercise their influence in specific cases, it appears that it supports the view of Ferguson and Roberts

¹²¹ To date, and to the best of our knowledge, no Canadian research is based upon the actual observation of the plea bargaining process. Extremely little of even the American research into plea bargaining is based upon actual observation of the process. One of the few exceptions is the work done by Buckle and Buckle, *supra* note 13. For a further discussion of the weaknesses of the empirical research into plea bargaining, see Cousineau and Verdun-Jones, *Evaluating Research into Plea Bargaining in Canada and the United States: Pitfalls Facing the Policy-Makers* (1979), 21 Can. J. of Criminology 293.

¹²² Grosman, *supra* note 42, at 502.

¹²³ Working Paper No. 15, *supra* note 8, at 48.

that plea bargaining may be eliminated by means of "a judicial pronouncement that any plea of guilty which was induced by a prosecutorial bargain is involuntary and therefore invalid."¹²⁴ Since the Law Reform Commission does not distinguish between the various forms of relationships that may exist between Crown and defence counsel in the pre-trial process, it is doubtful whether these methods would achieve a high degree of success. As we have seen, the term 'plea bargaining' covers such a variety of pre-trial relationships (some of which may be proper and others that may be highly improper), that a simple statement that plea bargaining must be eliminated is not only ineffective, but highly confusing to criminal justice practitioners. It is curious that the Law Reform Commission should settle upon these two methods of implementing its abolitionist stance without considering other techniques available for its purposes.

Ferguson and Roberts, for example, suggest three other techniques. First, they propose a legislative pronouncement to the effect that plea bargaining is illegal and that any guilty pleas obtained as a result of the practice would be invalidated.¹²⁵ Second, they argue that ethical standards prohibiting the practice should be enforced vigorously against those counsel who violate them.¹²⁶ Still, they do indicate their doubt as to the efficacy of this technique in eliminating plea bargaining.¹²⁷ Third, they suggest that an effective method of suppressing the practice would be to eliminate the incentives to engage in plea bargaining. For example, if it is true that plea bargaining is the outcome of a shortage of court resources, it would be more rational to increase those resources than to rely on the practice of plea bargaining.¹²⁸

¹²⁴ *Supra* note 10, at 573.

¹²⁵ *Id.* Presumably, the authors intend to refer to legislation of the Federal Parliament.

¹²⁶ *Id.* This is also the view of the Ontario Law Reform Commission, *supra* note 9, at 125.

¹²⁷ *Id.* However, by itself, this method might not be too effective since lawyers, like other professionals, would be slow to report the conduct of fellow lawyers, particularly if the conduct involved is not traditionally criminal. Many lawyers, if they were to discover another lawyer bargaining, might easily rationalize that the conduct in the circumstances of the particular case was not unethical, and therefore it would not be reported.

¹²⁸ In addition to providing more court resources, they suggest that case load pressure may be reduced further by ensuring that a reasonably high flow of guilty pleas will be maintained by the introduction of systematic procedures for discovery in the criminal process. Ferguson and Roberts, *supra* note 10, at 575-76:

Another important factor in removing the incentive to engage in plea bargaining would be to recognize the lesson learned in other jurisdictions, that is, that a fair and sensible charging process coupled with full discovery of the prosecution case is successful in maintaining a reasonably high flow of guilty pleas.

Also see Hooper, *Discovery in Criminal Cases* (1972), 50 Can. B. Rev. 445; Law Reform Commission of Canada, *Study Report: Discovery in Criminal Cases* (Ottawa: Information Canada, 1974); and Law Reform Commission of Canada, *Criminal Procedure: Discovery*, Working Paper No. 4 (Ottawa: Information Canada, 1974). In response to the concerns raised by the work of the Law Reform Commission on discovery in criminal cases, there have been pilot projects requiring full disclosure of the Crown's case in Montréal (see L.R.C.C., *Fourth Annual Report*, *supra* note 2, at 15) and Vancouver (announced May 30th, 1977). The Attorney General of Ontario has announced guidelines establishing a new system of disclosure in that province. See statement by Hon. R. R. McMurtry (1977), 37 C.R.N.S. 253; and Evans C.J.H.C.O., *Notice to the Profession* (1977), 37 C.R.N.S. 255-59.

There are still other techniques that may be employed in an attempt to eliminate plea bargaining. One highly effective method is legislative reform. For example, plea bargaining was alleged to have occurred on a widespread basis when conviction for a second offence contrary to section 234 of the *Criminal Code* (impaired driving) led to an automatic minimum prison sentence whereas a second conviction contrary to section 236(1) (driving with more than 80 mg. of alcohol in the blood) did not lead to such a drastic outcome. By providing for a minimum prison sentence for a second conviction of *both* offences, Parliament effectively destroyed any opportunity to plea bargain in relation to them. A further technique that may be considered is the elimination of prosecutorial discretion in relation to serious offences. In Germany, prosecutorial plea bargaining does not take place in relation to serious offences because the prosecutor is under a *legal duty* to lay charges in relation to such offences when there is sufficient evidence for him to do so.¹²⁹ Removing prosecutorial discretion as to the laying of charges is, of course, contrary to Canadian legal traditions, but such a technique is an effective means of eliminating plea bargaining.

In addition to their failure to consider the variety of techniques available to the policy maker, the Law Reform Commission studiously avoids the task of estimating the potential efficacy of the two techniques upon which they have put their seal of approval. Furthermore, the Commission adopts an extremely limited focus of inquiry throughout its discussion of plea bargaining. It mistakenly assumes that the abolition of plea bargaining will have an impact only upon prosecutors and defence counsel, and steadfastly refuses to consider the effects of adopting their policy throughout the entire Canadian criminal justice system. Recent empirical research published in the United States suggests that the blinkered approach of the Law Reform Commission is not only misguided, but also promises to open a Pandora's box of undesirable effects that may be considered equally (if not more) objectionable than the practice that the Commission has set out to eliminate.

One study that documents the proposition that the abolition of plea bargaining cannot be considered except in relation to the entire criminal justice system is Thomas Church's article, *Plea Bargains, Concessions and the Courts: Analysis of a Quasi-Experiment*.¹³⁰ Church examined the consequences for an entire judicial system of an attempt to abolish plea bargaining

¹²⁹ See Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: State University Press, 1969) at 191-95; Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany* (1970), 18 *Crim. J. Comp. L.* 508; Langbein, *Controlling Prosecutorial Discretion in Germany* (1974), 41 *U. Chi. L. Rev.* 439; and Herrmann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany* (1974), 41 *U. Chi. L. Rev.* 468. Also see Vouin, *The Role of the Prosecutor in French Criminal Trials* (1970), 18 *Am. J. Comp. L.* 483.

¹³⁰ *Supra* note 13, at 377. His study is of a suburban county criminal justice system considered to be very much *unlike* those found in major urban centres that display the worst "pathologies" of criminal justice. The court system is double-tiered, consisting of municipal and district courts, and a circuit court. This criminal justice system is well financed, with high salaries for employees, ample office facilities, and adequate staff who display high levels of morale and professionalism.

by the introduction of a policy that outlawed the reduction of charges in drug trafficking.¹³¹ This policy was enforced rigorously by the chief prosecutor. Before the introduction of this new policy, the most common method of dealing with drug sale cases was the negotiation of a guilty plea by the prosecuting and defence attorneys. The charges were usually reduced from "delivery of a controlled substance" to "attempted sale" or "possession" in exchange for a guilty plea.¹³² Church suggests that this system initially produced a tendency for prosecutors to "over-charge" in such cases.

A salient feature of this system was judicial abstention from the actual process of negotiating agreements; indeed, Church contends that there was considerable evidence that many judges regarded judicial involvement in such practices as being highly improper and repugnant. Nevertheless, the courts typically ratified the agreements reached by the prosecutor and defence attorneys.

After the new policy was implemented, there was a significant change in the method of disposing of trafficking cases: the practice of pleading guilty to a reduced charge was eliminated almost completely, the percentage of cases coming to trial increased, and there was a considerable decrease in the total proportion of cases decided by means of the guilty plea. These findings, however, should not obscure the fact that, even after the policy change, as many as 75 percent of the defendants entered a plea of guilty to the *original* charge—despite the prospect of a maximum sentence of twenty years.¹³³ Clearly, the willingness of defendants to plead guilty to such a serious charge requires some explanation. In Church's view, the key to such an explanation may be found in the new patterns of bargaining that emerged.

The most remarkable consequence of implementing the new policy was that, despite the widespread agreement among judges that judicial participation in the process of plea bargaining was highly improper, a significant number of them found themselves becoming increasingly—albeit reluctantly—involved in the practice of negotiating sentences. This judicial involvement

¹³¹ Church's study attempted to determine the impact of the abolition of plea bargaining upon several components of a judicial system. Many studies, however, are very narrow in focus. For example, a study in Oregon resulted in "impressionistic interpretations" of very little data. See Hass, *High Impact Project Underway in Oregon: No Plea Bargaining, Robbery and Burglary* (1974), 10 Prosecutor 127-28. Another study of the effects of abolishing plea bargaining found that the rates of plea bargaining were indeed lower following a ban on it. See Note, *The Elimination of Plea Bargaining in Black Hawk County: A Case Study*, *supra* note 13, at 1053-71. A third study attempted to determine the consequences of a ban on plea bargaining on trial and guilty plea rates. See Berger, *The Case Against Plea Bargaining*, *supra* note 13, at 621-24. These studies do not provide an adequate basis for reasoned conclusions about the consequences of the curtailment or elimination of plea bargaining. While each study suffers from its own limitations, such as short time spans, the most common limitation is that they are narrowly conceived. The stated possibility that changes in plea bargaining practices may or may not affect one or two aspects of a criminal justice system provides no real assessment of the overall consequences of such changes.

¹³² Church, *supra* note 13, at 379.

¹³³ *Id.* at 383-84.

in the bargaining process assumed a considerable variety of forms, and it is interesting to note that Church found that those judges who resisted this trend towards involvement in the negotiation of sentences encountered considerable "docket problems." The evidence indicates that after the "no plea bargain" policy was implemented, the trial rate soared, but it increased primarily for those judges who would not become involved in the sentence negotiation practices. Quite clearly, then, the elimination of prosecutorial plea bargaining—far from achieving the goals mirrored in the new policy—merely displaced the arena in which the practice occurred. As a consequence, many of the judges became reluctant partners in the process of negotiating sentences.

The introduction of the new policy also stimulated significant change in the practices of prosecutors. The incidence of *nolle prosequi* and dismissal of charges increased by about one third, and this remarkable trend was reflected in a sharp decline in the overall conviction rate. Confronted by this decline, the police responded both by improving their charging practices and by reducing the total number of warrants issued. Nevertheless, during this initial change-over period, prosecutors actually *increased* their dismissal rate in spite of the improved preparation of cases by the police. It may be contended perhaps that the reduction in the number of discretionary options available to the prosecutors merely produced a situation in which increased reliance was placed on the one drastic option that they were still empowered to employ. Since an improvement in police charging practices normally might be expected to decrease the dismissal rate, the discovery of a directly contrary trend raises serious questions about the wisdom of the new policy outlawing plea bargaining.

While Church by no means investigates all of the possible consequences for the criminal justice system of abolishing plea bargaining, his research nevertheless conveys a salutary warning to those commentators who blithely assume that the abolition of the practice necessarily will have only "beneficial" effects in terms of their own value system. It might be suggested that if abolition of plea bargaining at the prosecutorial level of the justice system leads both to sentencing negotiations at the judicial level, and to greatly increased rates of dismissal at the prosecutorial level (despite improved case preparation by the police), then the "cure" may be somewhat worse than the perceived "disease." Of course, it may well be argued that there is nothing inherently unconscionable about sentence negotiation with the judiciary. Nevertheless, although there are no doubt a number of people who would support such a practice, it must be emphasized that the Law Reform Commission itself has, as we have seen, steadfastly refused to recognize that justice may be "purchased at the bargaining table." In other words, the Commission has failed to advert to those consequences of its proposed reform that clearly contravene its *own value system*. Indeed, it is precisely this type of short-sighted analysis that the present authors feel vitiates the Commission's basic approach and its conclusions.

While Church's findings are highly dramatic, published research from other sources indicates that his emphasis upon the need to study plea bargaining within the context of the total justice system is by no means misplaced. For example, H. Joo Shin contends that concessions extracted from the pro-

secutor may well be neutralized by subsequent adjustments made during the parole process.¹³⁴ If Shin's comments are valid, it once again becomes clear that discussion of plea bargaining without advertence to the system-wide implications of the practice amounts to sheer intellectual folly.

VI. CONCLUSIONS: THE LAW REFORM COMMISSION OF CANADA AND "DIVERSIONARY BARGAINING"

Ironically, the Law Reform Commission's approach to the question of plea bargaining indicates not only a failure to consider the practice within the context of the total justice system, but also an apparent inability to relate its views on plea bargaining to its published stance on other issues in criminal justice.¹³⁵ For example, the Commission blithely ignores the potential for prosecutorial bargaining that is clearly inherent in the process of pre-trial settlement or diversion—a practice that it has enthusiastically espoused.¹³⁶ Essentially, the Commission's proposals in relation to pre-trial settlement place an accused person in the position of making a choice between the uncertainties of the trial process and the present advantage of freedom from prosecution, provided he or she agrees to make restitution or compensation to the alleged victim, or similar amends.¹³⁷ The coercive undertones to such a system of diversion have been articulated dramatically by Norval Morris:

A student with prosecutorial experience put it aphoristically, if exaggeratedly, to me: "The guilty we convict; the innocent we divert and supervise." Such is the coercive threat of trial, the pain of detention, the delays, the fears and

¹³⁴ Shin, *Do Lesser Pleas Pay?: Accommodations in the Sentencing and Parole Processes* (1973), 1 J. Crim. Justice 27. Two studies of Parole Board decision-making in Canada have been published recently. However, neither of these works discusses the extent (if any) to which Board members consider the effects of plea bargaining upon the inmate's sentence. See Carrière and Silverstone, *The Parole Process: A Study of the National Parole Board* (Ottawa: Law Reform Commission of Canada, 1976). For an excellent discussion of the problems facing reformers in "a criminal justice system of diverse locations of sentencing power," see Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing* (1978), 126 U. Pa. L. Rev. 550.

¹³⁵ McNaughton-Smith, *Permission to be Slightly Free: A Study of the Granting, Refusing and Withdrawing of Parole in Canadian Penitentiaries* (Ottawa: Law Reform Commission of Canada, 1976). Hagan argues that, within a Canadian context, "considerations won in early stages of the legal process may ultimately prove illusionary" largely because of the broad scope of the sentencing power exercised by the Canadian trial judge. See Hagan, *supra* note 12, at 544. Also see Solicitor General of Canada, *Diversion: A Canadian Concept and Practice; A Report on the First National Conference on Diversion October 23-26, 1977, Quebec City* (Ottawa: Minister of Supply and Services Canada, 1978).

¹³⁶ See Law Reform Commission of Canada, *Report on Dispositions and Sentences in the Criminal Process: Guidelines* (Ottawa: Information Canada, 1976); Law Reform Commission of Canada, *Studies on Diversion* (Ottawa: Information Canada, 1975); Law Reform Commission of Canada, *Diversion*, Working Paper No. 7 (Ottawa: Information Canada, 1975).

¹³⁷ *Diversion*, Working Paper No. 7, *id.*, at 8-12. It is important to note that in a pre-trial settlement (as opposed to "community absorption" or policy "screening"), the Commission recommends that a charge should have been laid previously (at 15-16). Also see Neijelski, *Diversion: The Promise and the Danger* (1976), 22 Crime & Delinquency 393.

uncertainties of punishment, that diversionary processes prove compelling for all but the most determinedly innocent or the most experienced in crime.¹³⁸

It is true that the Commission stresses the need for procedural fairness and public scrutiny of the process.¹³⁹ However, pre-trial settlement is *par excellence* a form of "negotiated justice," and it would be most enlightening to discover why "diversionary bargaining" is regarded as a practice to be encouraged while the more traditional plea bargaining is a practice to be treated with moral outrage. The real objection to the Commission's approach is that it wrests the process of negotiation away from the ultimate control of the trial judge. In the United States, the trend has been towards ensuring procedural fairness in negotiated justice by requiring that all negotiated dispositions be presented to the trial judge for ratification or rejection. At this stage of the process, the judge has the opportunity to ensure that the interests of the public, the offender, and the victim are protected adequately. One does not have to be unduly cynical to suggest that the Commission's proposal to leave control of the process in the hands of Crown counsel is considerably less satisfactory than the American legislation, which establishes an impartial judge as the ultimate arbiter of the bargaining process.¹⁴⁰

¹³⁸ Morris, *The Future of Imprisonment* (Chicago: University of Chicago Press, 1974) at 10-11. In a recent case in the Supreme Court of British Columbia, Anderson J. rejected an important component of the L.R.C.C. scheme when he ruled that the Crown may not proceed with any charges once a diversion agreement has been reached:

[T]he prosecutor held the threat of criminal proceedings over the head of the respondent, in order to induce her to enter into and carry out wishes of the prosecutor.

The Crown cannot usurp the function of the courts in this way. The courts and only the courts have the right to impose sentence and the Crown cannot create an administrative program, inherently coercive in nature, whereby the accused accepts "diversion" on terms fixed by the prosecutor, subject to control by the prosecutor, who retains the discretion to revive the criminal proceedings if the accused fails to adhere to the terms fixed by the prosecutor. The prosecutor is an officer of the court and he cannot use his office or his discretion to invade the exclusive jurisdiction of the judiciary. He cannot thwart the rule of law in this way.

See *R. v. Jones*, [1978] 3 W.W.R. 271 at 283, 40 C.C.C. (2d) 173 at 183 (B.C.S.C.).

¹³⁹ *Diversion*, Working Paper No. 7, *supra* note 136, at 14-22.

¹⁴⁰ It must be emphasized that the authors do not disapprove of negotiations as a means of resolving all disputes presently entering the court system. On the other hand, it is contended strongly that the parties themselves should not, through prosecuting and defence counsel, always have the final say in fashioning diversion agreements. Only a party who is removed from the actual process of negotiation can determine properly whether a diversion agreement satisfactorily represents the interests of the public, the victim and the alleged offender.